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In The

Supreme Court of the United States

October Term, 1983

JOHN B. KENNEDY,

Petitioner,

vs.

THE BOARD ON PROFESSIONAL RESPONSIBILITY OF THE SUPREME COURT OF DELAWARE and THE SUPREME COURT OF DELAWARE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the petitioner in an attorney disciplinary proceeding was denied his right to due process since the Board on Professional Responsibility of the Supreme Court of Delaware commingled without adequate safeguard the investigative, prosecutorial and adjudicative functions.

2. Whether the discovery rules before the Board on Professional Responsibility of the Supreme Court of Delaware denied the petitioner his right to due process in a quasi criminal proceeding since the rules do not allow for reciprocity of discovery and shift the burden of proof to the petitioner in a quasi criminal proceeding.

3. Whether the petitioner was denied his right to due process since he was never notified he was being charged with disciplinary violations but instead was told he was facing a civil contempt proceeding.

4. Whether the petitioner was denied his right to due process and his right to counsel when on the first listing the Board on Professional Responsibility denied him a continuance even though his counsel was not available.

5. Whether the Supreme Court of Delaware erred and denied the petitioner his right to due process by not providing the petitioner a hearing or the opportunity to present evidence as to the nature of the discipline to be imposed.

TABLE OF CONTENTS

Page

Questions Presented for Review i

Table of Contents ii

Table of Citations iii

Opinion Below 1

Jurisdiction 2

Constitutional Provisions and Regulations Involved 2

Statement of the Case 2

Reasons for Granting the Writ:

I. The petitioner in an attorney disciplinary proceeding was denied his right to due process since the Board on Professional Responsibility of the Supreme Court of Delaware commingled without adequate safeguard the investigative, prosecutorial and adjudicative functions 5

II. The petitioner contends the discovery rules of the Board on Professional Responsibility violated his right to due process by denying him reciprocity of discovery and shift the burden of proof in a disciplinary proceeding. 15

Contents

Page

III. The petitioner was denied his right to due process since he was never notified or advised he was facing an attorney disciplinary proceeding but instead was only notified he faced a civil contempt proceeding. 17

IV. The petitioner was denied his right to due process, his right to counsel and his right to confront witnesses when the Board refused to continue the first listing of his attorney disciplinary case when his counsel was not available. 19

V. The petitioner was denied his right to due process since he was not given the opportunity to present evidence as to the nature of the discipline to be imposed... 27

Conclusion 29

TABLE OF CITATIONS

Cases Cited:

Carey v. Piphus, 435 U.S. 247, 98 S. Ct. 1042 (1978) 11

City of Mishawaka v. Stewart, 261 Ind. 670, 310 N.E. 2d 65 (Sup. Ct. of Indiana, 1974) 13

Commonwealth v. Wolfe, ____ Pa. Super. ____, 447 A. 2d 305 (1982).....23, 24

Giddens v. State Bar of Cal., ____ Sup. Ct. ____, 621 P. 2d 851 (1981).....27, 28

Contents

Page

Gideon v. Wainwright, 372 U.S. 335, 83 Sup. Ct. 792 (1963) 22

Goldberg v. Kelly, 397 U.S. 254, 90 Sup. Ct. 1011 (1979) 25, 26

In re Gault, 387 U.S. 1, 87 Sup. Ct. 1428 (1967) 22

In re Kennedy, ____ Del. Sup. Ct. ____, 442 A. 2d 79 (1982) 18

In re Munchison, 349 U.S. 133, 75 S. Ct. 623 (1955) 8, 9

In re Murphy, ____ Michigan Sup. Ct. ____, 198 N.W. 2d 289 (1972).....26, 28

In re Ruffalo, 390 U.S. 544 (1968) 11, 16, 18, 22

Marshall v. Jerrico, Inc., 446 U.S. 238, 100 S. Ct. 1610 (1980) 13, 14

Matter of Rosenbaum, ____ Pa. ____, 385 A. 2d 1329 (1978) 18

Matter of Thorup, ____ D.C. App. ____, 432 A. 2d 1221 (1981)..... 28

Morris v. Slappy, ____ U.S. ____, 103 S. Ct. 1610 (1983) 23

Schweiker v. McClure, ____ U.S. ____, 102 S. Ct. 1665 (1982) 13

Contents

Page

State v. Kelly, 112 S.E. 2d 641 (Sup. Ct. of App., W. Va. 1960) 13

Taylor v. Hayes, 418 U.S. 488, 94 S. Ct. 2967 (1974) 14

Tumey v. State of Ohio, 273 U.S. 510, 47 S. Ct. 437 (1927) 8

United States v. Green, 680 F. 2d 183 (D.C. Cir. 1982), cert. denied, 103 S. Ct. 1204 (1983) 28

Wardius v. Oregon, 412 U.S. 470, 93 Sup. Ct. 2208 (1973) 15, 16

Willner v. Committee on Character and Fitness, 373 U.S. 96, 83 Sup. Ct. 1175 (1962).....26, 28

Withrow v. Larkin, 421 U.S. 35, 95 S. Ct. 1456 (1975) 9, 10, 11

Statutes Cited:

28 U.S.C. §1257(3)..... 2

42 U.S.C. §1983 9

United States Constitution Cited:

Fifth Amendment 2

Fourteenth Amendment..... 2

Contents

Page

Rules and Regulations Cited:

The Rules of the Board on Professional Responsibility of the Supreme Court of Delaware 2

Censor Rule 3 ..... 6, 7

Censor Rule 4 7

Censor Rule 5 ..... 6, 7, 15

Censor Rule 6 6

Censor Rule 7(d) 6

Censor Rule 8 ..... 15, 17

Censor Rule 11 ..... 15, 22

Censor Rule 13 15

DR-1-102(A)(5) 3

DR-2-106 3

DR-2-110(A)(2) 3

DR-6-101(a)(2)(3) 3

DR-7-101(A)(1)(2) 3

DR-7-106(c) 3

Contents

Page

APPENDIX

Appendix A — Opinion and Order of the Supreme Court of Delaware Dated January 24, 1984 ..... 1a

Appendix B — Order of the Supreme Court of Delaware Dated February 9, 1984..... 50a

Appendix C — Relevant Rules and Regulations 51a

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THE BOARD ON PROFESSIONAL RESPONSIBILITY OF THE SUPREME COURT OF DELAWARE and THE SUPREME COURT OF DELAWARE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

The petitioner, John B. Kennedy, by his attorney, Samuel C. Stretton, Esquire, respectfully requests that a writ of certiorari issue to review the order of the Supreme Court of Delaware entered in this proceeding on January 24, 1984 suspending the petitioner from the practice of law for two years and the order of February 9, 1984 denying the motion for reargument, the motion for hearing en banc, and the request for stay of discipline.

OPINION BELOW

The order of the Supreme Court of Delaware was filed on or about January 24, 1984 in a reported opinion. A copy of the opinion is attached hereto as Appendix A. On or about February 9, 1984, the Supreme Court of Delaware additionally denied the petitioner's motion for reargument, motion for rehearing en banc

and request for a stay. A copy of the aforementioned order of February 9, 1984 is attached hereto as Appendix B.

JURISDICTION

The jurisdiction of this Honorable Court is invoked under 28 U.S.C.A. §1257(3).

CONSTITUTIONAL PROVISIONS AND REGULATIONS INVOLVED

Article Five of the United States Constitution which states as follows:

> "nor be deprived of life, liberty or property, without due process of law."

Article Fourteen, Section One of the United States Constitution which states as follows:

> "nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Rules of the Board on Professional Responsibility of the Supreme Court of Delaware, a copy of which are attached as Appendix C.

STATEMENT OF THE CASE

The present proceeding arises out of four separate attorney disciplinary hearings brought against the petitioner, a member of the Bar of the Supreme Court of Delaware, by the Board on Professional Responsibility of the Supreme Court of Delaware. In each of the proceedings, the issues presented for review, with the exception of issue number 5, were raised at the time of the respective hearings before the Board on Professional Responsibility, raised again in the respective exceptions to the Draft Reports of the Board on Professional Responsibility, raised again in the respective exceptions to the final reports of the Board on Professional Responsibility, and finally raised in the respective briefs filed with the Supreme Court of Delaware. Issue number

5 was raised for the first time in the petition for reargument and rehearing filed with the Supreme Court of Delaware because the court, after upholding the finding of violations, imposed a two year suspension on the petitioner without providing him an opportunity to present evidence on the nature of the discipline.

For the purpose of identification, the four cases will be referred to by the docket numbers assigned by the Supreme Court of Delaware.

In Matter 204 of 1982, the petitioner was charged and ultimately found in violation of Disciplinary Rules 6-101(a)(2)(3), 7-101(A)(1)(2) and 2-110(A)(2) arising out of his refusal to represent a woman on an appeal in a domestic case without being paid when his error at the hearing level necessitated the appeal. In Matter 205 of 1982, the petitioner was found in violation of DR-2-106 alleging excessive fee when he charged a contingent fee of 50% on a workman's compensation matter. In Matter 60 of 1983, the petitioner was found in violation of DR-1-102(A)(5) and DR-7-106(c) on allegations he overstepped the bounds of zealous advocacy and was discourteous during the trial of a drunk driving case before a district justice. In Matter 75 of 1983, the petitioner was not charged with any disciplinary violations but was notified he was to appear at a hearing to determine if he should be held in contempt due to his refusal to provide the Board on Professional Responsibility with requested information.

All four matters were reviewed by the entire Board on Professional Responsibility on an ex parte basis to determine if there was sufficient evidence to issue a rule to show cause. The petitioner was not allowed to be present at this hearing. Hearing panels consisting of members of the Board on Professional Responsibility who had participated in the earlier ex parte review were then assigned to hear the evidence and decide whether the petitioner had violated the charged Disciplinary Rules. Another member of the same Board on Professional Responsibility was given the prosecuting role. Therefore, the petitioner in each of the four disciplinary matters faced a panel which had already been tainted by an ex parte review. Further, the prosecutor was another member of the same Board. Finally, since there were no inherent safeguards, the petitioner could and did find himself before a hearing panel where one or more members performing the adjudicatory role were in a separate hearing involving the petitioner performing a prosecutorial role.

In case 204 of 1982, the petitioner had a disciplinary hearing on May 12, 1981. In case 205 of 1982, the petitioner had a hearing on April 15, 1982. The draft report of the Board on 204 of 1982 finding the petitioner in violation was issued on June 17, 1982. The draft report of the Board on 205 of 1982 was issued on June 1, 1982. The prosecuting attorney in 205 of 1982, Alton Tybout, Esquire, sat as a member of the hearing panel in 204 of 1982. Further, O. Francis Biondi, sitting as a hearing member in 204 of 1982, after the initial report changed his role to that of the prosecuting attorney in arguments before the Supreme Court of Delaware. Further, Mr. Biondi, while he was acting as a hearing member on 204 of 1982, was acting as the prosecutor in Matter 60 of 1983 during the April 22 and May 19, 1982 hearing on that matter.

In 75 of 1983, the petitioner was notified he was being charged with disciplinary violations. Instead, the rule to show cause specifically stated the proceeding was to "show cause why you should not be held in contempt of the Delaware Supreme Court." The proceeding was initated since the petitioner refused to produce certain documents as requested by the Board because he was challenging the constitutionality of the Rules. Despite the fact the petitioner was never notified or charged with disciplinary violations in 75 of 1983, the petitioner was still found in violation of Disciplinary Rules and suspended from the practice of law.

Further, in 75 of 1983, the petitioner was challenging the Board on Professional Responsibility's request for production of information on the basis the rules denied him his right to due process since the rules prohibited him for making similar discovery requests. There was no reciprocity of discovery. Further, the petitioner contended the discovery requests unfairly shifted the burden of proof to him in a quasi criminal proceeding.

In 60 of 1983, the first hearing was set for April 22, 1982. The petitioner's counsel, Samuel C. Stretton, who had been his attorney in all the disciplinary matters, requested a continuance due to scheduling conflicts 2½ weeks before the hearing. The continuance was denied and the hearing on April 22, 1982 proceeded with the petitioner unrepresented and refusing to participate. On May 19, 1982, the Board scheduled a second hearing to allow petitioner to present a defense. At that hearing, with his counsel, Mr. Stretton, present, the Board rejected the

petitioner's counsel's request for the opportunity to cross examine the witnesses who testified during the April 22, 1982 hearing.

Matters 204 and 205 of 1982 were argued before the Delaware Supreme Court in April of 1983. Matters 60 and 75 of 1983 were argued before the Delaware Supreme Court in October of 1983. The Delaware Supreme Court does not take de nova review of the factual findings of the Board on Professional Responsibility. The Delaware Supreme Court, on January 24, 1984, issued an opinion and order combining all four matters. The Delaware Supreme Court denied the petitioner's exceptions and suspended him from the practice of law for a period of two years after which he was allowed to apply for reinstatement.

The petitioner was never given the opportunity at any stage of the proceedings to present evidence on the issue of the nature of discipine to be imposed. The only hearings provided him went to the issue of whether he was in violation.

The petitioner, by his counsel, filed a petition for rehearing, a petition for hearing en banc and a petition requesting a stay. The Supreme Court of Delaware denied the three requests by order dated February 8, 1984.

As a result, the petitioner, by his counsel, respectfully files the present petition for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

I.

The petitioner in an attorney disciplinary proceeding was denied his right to due process since the Board on Professional Responsibility of the Supreme Court of Delaware commingled without adequate safeguard the investigative, prosecutorial and adjudicative functions.

The petitioner contends the Rules of the Board on Professional Responsibility applicable to the present proceedings denied him his constitutional right to due process and a fair trial since the investigative, prosecutorial and adjudicative functions were commingled without adequate safeguards.

Rule 3 of the Board on Professional Responsibility provides for a member of the Board to conduct the initial investigation when a complaint has been made. The Rule precludes such a committee member from taking part in the deliberations in reference to the complaint.

Rule 5 of the Censor Committee Rules allows the chairman to create a subcommittee for preliminary investigations. The subcommittee consists of committee members who submit a recommendation to a full committee on an ex parte basis.

> "The subcommittee shall investigate such complaint or other matter referred as fully as need be to determine the essential facts of matter prima facie, and shall submit a report thereof to the Committee with appropriate recommendations as to the disposition of the matter."

Again, Rule 5 prohibits a member of the investigating subcommittee from taking part in the deliberations or decisions of the Censor Committee in reference to the complaint. But the Rule provides for ex parte review by the entire Board without participation or even the presence of the petitioner. From the now tainted members of the Board are chosen the Hearing Panel members.

Rule 6 of the Censor Committee authorizes the chairman to appoint a committee member to issue the rule to show cause against a respondent and to act as the prosecuting officer during the subsequent disciplinary proceeding.

Rule 7(d) of the Censor Committee states the Chairman of the Board on Professional Responsibility or his designee, shall preside and the chairman shall appoint a member of the committee to proceed as the prosecutor.

The review of the aforementioned rules demonstrates that members of the Board on Professional Responsibility essentially play at any given time, the investigative role, the prosecutorial role and the adjudicative role. Although Rules 3 and 5 attempt to prevent the committee member who is acting as the investigator and prosecutor from assuming an adjudicate role in that particular case, the Rules themselves encourage an overlapping of the roles

by allowing the investigator to submit an ex parte report to the committee to determine if a prima facie case has been made out (Rule 5 of the Censor Committee). Further, Rules 3, 4, and 5 do not require the chairman from disqualifying himself although often the chairman is the initial person who receives the complaint.

The Censor Committee Rules are silent on the role of a committee member if there is more than one complaint involving a petitioner. For instance, the Rules provide no guidance and, in fact, allow a committee member who is investigating and prosecuting the petitioner on one matter, to play an adjudicative role involving the petitioner on another pending matter. In practice, this type of commingling occurs regularly.

The present cases on review provides a classical example of the commingling of functions which can not but create the appearance of impropriety and raise the serious question as to whether the petitioner has been denied his right to due process.

In case 205 of 1982, Mr. Tybout began his role as the investigator in September of 1980 (205 of 1982, N.T. 248, 249, 250). Mr. Tybout thereafter submitted his recommendation on an ex parte basis to the full committee, issued the rule to show cause and then acted as the prosecuting officer during the April 15, 1982 proceeding. A review of the trial record demonstrates Mr. Tybout vigorously pursued his prosecuting functions and, in fact, expressed his personal opinion of the excessive nature of the fee arrangement during his opening statement.

> "regardless of that issue, the fee is clearly excessive under the applicable rule." (205 of 1982, N.T. 6).

At the same time, Mr. Tybout was performing his vigorous role as an advocate to discipline the petitioner in case 205 of 1982, he was sitting as an adjudicating officer in case 204 of 1982. The hearing on 204 of 1982 was held on May 12, 1981. The committee's final report in which Mr. Tybout joined was issued in June of 1982, shortly after the trial in 205 of 1982. Mr. Tybout also was acting as the prosecuting officer in case number 223 of 1982 which was argued before the Delaware Supreme Court during the time in question. Even considering Mr. Tybout 's excellent credentials and high reputation for integrity, clearly he cannot avoid the inherent bias of his two inconsistent roles, *i.e.*, vigorous prosecutor and impartial adjudicative officer.

Similarly, Mr. Biondi acted in his adjudicative capacity in 204 of 1982. At the same time, he was filling that role he was acting as an investigative and prosecutorial officer in case 60 of 1983. Finally, Mr. Biondi, in case 204 of 1982, had been appointed to represent the Board of Professional Responsibility before the Supreme Court of Delaware, even though he sat as one of the adjudicating committee members. Thus, Mr. Biondi, in case 204 of 1982, is acting as both the prosecutor and the judge. Again, despite Mr. Biondi's excellent reputation, the inherent impossibility of performing in two entirely inconsistent roles, presents serious questions whether the petitioner was accorded his constitutional right of due process.

In deciding the issue of whether the commingling of functions has denied the petitioner's right to due process, the language of former Chief Justice Taft must be kept in mind.

> "Every procedure which would offer a possible temptation to the average man as a Judge to forget the burden of proof required to convict the Defendant, or which might lead him not to hold the balance nice, clean and true between the state and the accused denied the latter due process of law." *Tumey v. State of Ohio,* 273 U.S. 510, 47 S. Ct. 437, 444 (1927).

The *Tumey* case involved a mayor adjudicating a violation of the Prohibition Act where the mayor had pecuniary and other interests in the outcome. The language of Chief Justice Taft is equally applicable when a committee member is performing two inconsistent roles involving the same petitioner.

> "A situation in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, necessarily involves a lack of due process of law in the trial of Defendants charged with crimes before him." *Id.* at 445.

The next major case involving the commingling of function was *In re Munchison,* 349 U.S. 133, 75 S. Ct. 623 (1955). In this case, a judge who sat as a one-man jury, also sat as the judge at the contempt proceedings of witnesses whose contempt charges

arose from the grand jury proceeding. The issue was whether this procedure denied the witness an impartial tribunal. The Supreme Court stated the witness' due process right was violated and discussed the elements of a fair trial.

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. *But our system of law has always endeavored to prevent even the probability of unfairness.* To this end, no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision . . . . *Such a stringent rule may sometimes ban trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties.* But to perform its high function in the best way justice must satisfy the appearance of justice." *Id.* at 625 (emphasis added).

The petitioner contends the rationale applies to his present proceedings where adjudicative officers are acting simultaneously as prosecution officers on other pending matters.

The next major United States Supreme Court decision on the commingling issue is *Withrow v. Larkin,* 421 U.S. 35, 95 S. Ct. 1456 (1975). In this particular case, a medical doctor sought in a suit filed pursuant to 42 U.S.C. §1983 to enjoin the investigation of the licensing board. The Court discussed the standard for a reversal when there was a commingling of investigative and adjudicatory functions. The Court reaffirmed the standard of "probability of unfairness."

> "Not only is a biased decision maker constitutionally unacceptable but our system of law has always endeavored to prevent even the probability of unfairness." *Id.* at 47.

The Court then set forth the burden that must be met in demonstrating that commingling creates bias.

> "The contention that the combination of investigative and adjudicative functions necessarily

> creates an unconstitutional risk of bias in administrative adjudication has a much more difficult burden of persuasion to convey. It must overcome a presumption of honesty and integrity in those serving as adjudicators; and it must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individual poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." *Id.* at 47.

The facts of *Withrow* reveal several major differences from the present proceedings. First, *Withrow* involved an agency performing investigative and adjudicative functions not also performing prosecutorial functions. Second, *Withrow* clearly stated the doctor and his attorney were permitted to attend the investigative hearings. In the petitioner's cases, pursuant to Rule 5 of the Censor Committee Rules, the petitioner was not invited to participate in the investigatory hearing which was done on an ex parte basis.

> "The investigative proceeding has been closed to the public, but appellee and his counsel were permitted to be present throughout; counsel actually attended the hearings and knew the facts presented to the Board." *Id.* at 55.

The Court made it very clear that despite the burden imposed, the bottom line depended on whether a fair hearing was provided.

> "Clearly, if the initial view of the facts based on the evidence *derived from nonadversorial processes as a practical or legal matter foreclosed fair and effective consideration* at a subsequent adversary hearing leading to ultimate decision, a substantial due process question would be raised." *Id.* at 58 (emphasis added).

In the present matters, the ex parte review with the participation of members simultaneously acting as prosecutors, the petitioner contends, foreclosed a fair and effective consideration.

In evaluating the standards to be applied, it must always be remembered that an attorney disciplinary proceeding has been characterized as quasi criminal in nature. *In re Ruffalo,* 390 U.S. 544 (1968). The quasi criminal aspect of the attorney disciplinary proceeding, the respondent contends, requires a higher standard of due process than the normal administrative hearing which was the subject of the *Withrow v. Larkin,* 421 U.S. 35, 95 S. Ct. 1456 (1975) proceeding. The United States Supreme Court has made it clear the standard of due process depends on the context of the proceeding.

> "Thus, in deciding what process constitutionally is due in various contexts, the Court repeatedly has emphasized the procedural due process rules are shaped by the risk of error inherent in the truth — finding process — such rules minimize substantially unfair or mistaken deprivations of life, liberty or property by enabling persons to contest the basis upon which a state proposes to deprive them of unprotected interests." *Carey v. Piphus,* 435 U.S. 247, 98 S. Ct. 1042, 1050 (1978).

The Supreme Court then indicated that the appearance of a fair hearing is itself an important element of due process.

> "Petitioners do not deny that a purpose of procedural due process is to convey to the individual a feeling that the government has dealt with him fairly, as well as to minimize the risk of mistaken deprivations of protected interests." *Id.* at 1051.

The petitioner contends the inherent risk of loss of property right, his license to practice law, in a quasi criminal proceeding where prosecutors are also performing adjudicative functions requires a higher standard of due process which was not met in these disciplinary proceedings.

The Supreme Court of Pennsylvania in 1961 declared its then disciplinary system in violation of due process. The system in Pennsylvania was remarkably similar to the present Censor Committee system.

> "The functions of prosecutor, judge, and jury were combined in one body, namely the Committee on Offenses, which lodged and prosecuted and, through its subcommittee of three of its own members, adjudicated the charge of unprofessional conduct . . . ." *In re Schlesinger,* 404 Pa. 584, 172 A.2d 835 (1961).

The following language of the Pennsylvania Supreme Court is particularly appropriate.

> "Here, a member of the bar, charged with unprofessional conduct by a Bar Committee on Offenses, was prosecuted on the Committee's Complaint before a Subcommittee, composed of three members of the Committee, sitting as the trial tribunal. *In such a procedure, so contrary to traditional American judicial concepts, unfairness was, ipso facto, inherent.*" *Id.* at 841 (emphasis added).

The Pennsylvania Supreme Court also noted in the aforementioned case that the right to practice law "is constitutionally protected as a property right."

> ". . . the right to practice law is a right so valuable that Plaintiff may neither be extinguished, abetted nor dismissed by any proceeding short of one which fully comports with the historical and constitutional requisites of due process." *Id.* at 840.

The denial of due process can be present even if the finder of fact acted with the most worthy of intentions. This was emphasized by the Supreme Court of Appeals of West Virginia in striking down an administrative proceeding for revoking used car dealers' licenses.

> "This, of course, is not to intimate that the Commissioner or deputy commissioner acted with any evil intention of design, but the denial of due process within the meaning of the law, is of itself arbitrary and capricious action, though the officer

> or tribunal may have acted with the most worthy intentions." *State v. Kelly,* 112 S.E. 2d 641 (Sup. Ct. of App., W. Va. 1960).

The Supreme Court of Indiana discussed the issue of due process when a fireman was dismissed for conduct unbecoming an officer. The city attorney has served as an advocate and then subsequently participated in the decision-making process. The court held due process had been denied.

> "We believe that the countervailing interests in granting adversary hearings that are not only free of impropriety, outweigh the legislatively conceived and understandable interests in the convenience and economy of requiring city attorneys to function in the dual capacity as the city attorney was required to do in this case." *City of Mishawaka v. Stewart,* 261 Ind. 670, 310 N.E. 2d 65 (Sup. Ct. of Indiana, 1974).

The United States Supreme Court only recently discussed the issue of commingling and due process when considering whether Medicare hearing officers chosen by the insurance carrier violated due process. The hearing officers did not personally participate in the case prior to the hearing. The Court discussed the standard.

> "We must start, however, from the presumption that the hearing officers who decide Part B Claims are unbiased. . . . This presumption can be rebutted by a showing of conflict of interest or some other specific reason for disqualification." *Schweiker v. McClure,* ____ U.S. ____, 102 S. Ct. 1665 (1982).

The petitioner contends the failure of the Censor Committee Rules to establish safeguards so as to prevent a prosecutor from assuming a judicial function and the ex parte review of evidence provide the showing of conflict which denied him his fair trial.

The requirements of due process were recently set forth by the United States Supreme Court in *Marshall v. Jerrico, Inc.,* 446 U.S. 238, 100 S. Ct. 1610 (1980).

> "The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. . . . The neutrality requirement helps to guarantee that life, liberty or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law — at the same time, it preserves both the appearance and reality of fairness . . . by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 100 S. Ct., 1610 (1980).

The appearance of bias is sufficient to remove a judge. *Taylor v. Hayes*, 418 U.S. 488, 94 S. Ct. 2967, 2704 (1974).

A review of all the cases cited appear to establish certain underlying themes. Essentially, an individual is entitled to a neutral panel. Prior contact with a matter even in an investigation role does not by itself establish a due process violation. But where the commingling of the various functions creates an inherent bias, where there is potential for a predisposed arbitrator, then the due process clause will cause a reversal.

The petitioner contends the Board on Professional Responsibility essentially initiated the investigation of complaints, held ex parte hearings as to the prima facie nature of the evidence and then prosecuted and adjudicated the complaints. The actual operation as in the present case often presented the petitioner with panel members who also were simultaneously vigorously prosecuting him. Such a system the petitioner contends does not meet the minimal due process requirements and denied him a fair trial.

The petitioner, therefore, respectfully requests the present attorney disciplinary system in the State of Delaware be declared in violation of his right to due process and all findings of disciplinary violation be reversed.

II.

The petitioner contends the discovery rules of the Board on Professional Responsibility violated his right to due process by denying him reciprocity of discovery and shift the burden of proof in a disciplinary proceeding.

In Matter 75 of 1983, discovery requests were made upon the petitioner by the Board on Professional Responsibility by the issuance of interrogatories and subpoenas pursuant to Censor Committe Rules 8 and 13 (75 of 1983, N.T. 2, 3, 11, 12, 15). The petitioner refused to respond indicating he intended to challenge the constitutionality of these Rules (75 of 1983, N.T. 23).

A review of the two Censor Committee Rules are appropriate:

> "The Committee may require any member of the bar to answer written interrogatories propounded by it relevant to any matter which is the subject of an investigation or a preliminary or formal hearing." Rule 8.

Rule 13 provides for the issuance of subpoenas by the Committee. Rule 5 also allows the Board to issue subpoenas as part of its investigation.

The only Rule pertaining to a petitioner is Rule 11 which only gives the petitioner the right at the time of the hearing to use subpoenas to obtain the presence of witnesses and the production of books and records. This rule does not allow for pretrial discovery and the Board has consistently taken that position.

Therefore, although the Board has a very broad and almost unlimited right to obtain information from the petitioner, the petitioner has absolutely no right in return to seek information from the Board except in cases involving an out of state complaint.

The United States Supreme Court in the context of a criminal case, stated that the due process clause requires reciprocal discovery rights. *Wardius v. Oregon*, 412 U.S. 470, 93 Sup. Ct. 2208 (1973). The rationale given by the United States Supreme Court is particularly pertinent in the present proceeding which as previously discussed has been characterized as quasi criminal in nature.

> "We hold that the Due Process Clause of the Fourteenth Amendment forbids enforcement of alibi rules unless reciprocal discovery rights are given to criminal defendants. Since the Oregon statute did not provide for reciprocal discovery, it was error for the Court below to enforce it against Petitioner and his conviction must be reversed." *Id.* at 2211.

The Court then discussed the rationale for its holding which is equally applicable to the present proceeding.

> "Although the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded, but cf. *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, it does speak to the balance of forces between the accused and his accuser . . . But we do hold that in the absence of a strong showing of state interests to the contrary, discovery must be a two way street. The state may not insist that trials be run as a 'search for truth' so far as defense witnesses are concerned, while maintaining 'poker game' secrecy for its own witnesses. It is fundamentally unfair to require a Defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the State." *Id.* at 2212.

The Supreme Court then in footnote 9 suggested if anything, the advantage should favor the accused.

> "Indeed, the state's inherent information gathering advantages suggest if there is to be any imbalance in discovery rights, it should work in the Defendant's favor." *Id.* at 2212.

The petitioner contends the same rationale applies in an attorney disciplinary proceeding which has been characterized as a quasi criminal proceedings. *In re Ruffalo*, 390 U.S. 544 (1968).

The petitioner was faced with discovery requests involving detailed information on matters not even approved for a hearing.

In this quasi criminal proceeding, due process at a minimum, requires the petitioner to be granted the same discovery privileges as the Board.

Further, as can be seen from Rule 8, the discovery rules are very vaguely drafted. Essentially, the petitioner can be asked anything as long as an investigation is ongoing. Therefore, on a fee dispute possibly the petitioner could be asked detailed questions concerning his net worth, income and other personal financial questions. The potential for abuse is obvious as a result of the poorly drafted rules.

In this quasi criminal proceeding, the Board has the burden of proof. The petitioner contends the vaguely drafted discovery rule actually shifts the burden to the petitioner since the Board essentially, through its use of discovery, makes the petitioner either prove the case himself or face either a contempt or disciplinary proceeding. Therefore, if the petitioner refuses to produce the requested information as in this case, he can be disciplined as he was by suspension for two years even though he never has been given a hearing on the underlying complaints. Because of the quasi criminal nature of attorney disciplinary cases, the petitioner respectfully contends, as in a criminal case, the Board should not be allowed to shift the burden of investigation and the burden of proof to him.

III.

The petitioner was denied his right to due process since he was never notified or advised he was facing an attorney disciplinary proceeding but instead was only notified he faced a civil contempt proceeding.

The order to show cause in 75 of 1983 specifically stated the proceeding was one to "show cause why you should not be held in contempt of the Delaware Supreme Court." The order neither cites or refers to disciplinary violations and does not indicate that disciplinary violations are at issue. Instead, the order clearly reflects the hearing was to be one of civil contempt to require the response to discovery requests made by the Board on Professional Responsibility.

During the hearing itself, the Chairman stated the "purpose of this hearing is set forth in the Order to Show Cause." (75 of 1983, N.T. 3).

Despite the fact the order clearly stated it was a contempt proceeding, the Board recommended the petitioner be disciplined for failing to respond to interrogatories and subpoenas (75 of 1983, Final Report). The Board did not cite any disciplinary rule allegedly violated upon which to base the recommendation of discipline. The Supreme Court of Delaware then in its opinion used this supposedly civil contempt proceeding to justify the two year suspension.

The petitioner respectfully contends the Board has violated his right to due process by failing to give him notice of the charges or the fact the hearing was a disciplinary trial. The United States Supreme Court has held in attorney disciplinary proceedings, the petitioner must be given adequate notices of the charges and nature of the proceeding. *In re Ruffalo,* 390 U.S. 544 (1968). In *Ruffalo,* the Board added an additional charge after the attorney testified.

> "Disbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer. . . . He is accordingly entitled to procedural due process, which includes fair notice of the charge. . . . These are adversary proceedings of a quasi-criminal nature. C.F. *In re Gault,* 387 U.S. 1, 33. The charge must be known before the proceedings commence. They become a trap when, after they are underway, the charges are amended on the basis of the testimony of the accused." *Id.* at 550, 551.

The Pennsylvania Supreme Court in *Matter of Rosenbaum,* ____ Pa. ____, 385 A. 2d 1329 (1978) reversed the finding of disciplinary violations where the attorney was not given "due and proper notice of the charge."

The Supreme Court of Delaware in the case of *In re Kennedy,* ____ Del. Sup. Ct. ____, 442 A. 2d 79 (1982) stated an attorney must be given proper notice.

> "Next, Kennedy contends that he was denied due process when violations were found of which he had not been given notice. Clearly, an attorney is entitled to fair notice of charges against him asserted in disciplinary proceedings." *Id.* at 92.

The petitioner contends he was denied this fundamental due process when a contempt proceeding is arbitrarily treated as a disciplinary proceeding. A contempt proceeding obviously is very different from a disciplinary proceeding since civil contempt can be cured by production. A disciplinary proceeding involves the petitioner's right to practice law. In fact, the Board has never notified the petitioner what Disciplinary Rules formed the basis of the discipline recommendation.

The danger and basic unfairness to the petitioner by the improper intermixing of two very different proceedings is found on page 33a of the opinion of the Supreme Court of Delaware found in Appendix A.

> "Thus, while some instances of Kennedy's misconduct do not involve contempt of court, e.g. excessive fee charging, it is difficult to conclude that those instances which involve contemptuous acts do not call into question the fitness of Kennedy to practice law. Therefore, we weigh them equally along with the other types regardless of the contempt sometimes (or lack thereof) already imposed."

The essence of the right to due process should not allow a tribunal to after the fact decide a contempt proceeding will be considered as a disciplinary violation.

Wherefore, the petitioner respectfully requests a finding that the disciplinary proceeding violated his right to due process.

IV.

The petitioner was denied his right to due process, his right to counsel and his right to confront witnesses when the Board refused to continue the first listing of his attorney disciplinary case when his counsel was not available.

In case 60 of 1983, the petitioner was denied a continuance even though his counsel was unavailable. The order to show cause was issued on February 26, 1982. The order established a hearing date of Aprii 22, 1982. The petitioner was represented by Samuel C. Stretton, Esquire, who had represented the petitioner in a

number of matters before the Board of Professional Responsibility and who had represented the petitioner before the Supreme Court of Delaware in three other matters. The petitioner indicated one of the reasons he retained Mr. Stretton was the fact he was knowledgeable and emphasized the representation of attorneys in disciplinary proceedings (60 of 1982, N.T. 14, 15, 23, 24).

The petitioner's counsel due to other trial commitments had requested a timely continuance 2½ weeks prior to the trial date by letter dated April 5, 1982 (60 of 1983, N.T. 10). The petitioner had reiterated the continuance request during another unrelated disciplinary matter involving the petitioner on April 19, 1982 (60 of 1983, N.T. 6, 7). Although there was no dispute the petitioner's counsel's conflicts arose after the petitioner's case had been scheduled, an occurrence that sometimes cannot unfortunately be avoided, the petitioner's counsel made it very clear he was not able to be present during the April 22, 1982 trial (60 of 1983, N.T. 6, 7).

There was no evidence presented that the petitioner's counsel was acting in bad faith and further, there was no evidence that the petitioner's counsel in the other matters he represented the petitioner before the Board had abused or made a continuance in bad faith. The fact the petitioner's counsel had appeared before the Committee on another matter on April 19, 1982 demonstrated he was not trying to avoid the Board's hearing.

The petitioner on his own reiterated the continuance request during the April 22, 1982 hearing (60 of 1983, N.T. 5, 6, 14, 23, 24, 26, 43, 44). The Board stated the reasons for denying the continuance were due to a mandate from the court to proceed expeditiously, the need for a speedy trial and the fact the issues were not complex (60 of 1983, N.T. 7). The reasons need to be briefly examined. First, the mandate to proceed expeditiously would not be infringed by a bona fide continuance request at the first listing of a case where there was no pattern of making unnecessary requests. Further, the need to proceed expeditiously must be balanced by the respondent's right to counsel. Second, the petitioner certainly could not raise a laches of speedy trial argument if the continuance was at his request. Third, as can be seen from the voluminous testimony at the hearing and the issues raised in this brief, obviously this matter was a serious case involving important and complicated issues. The petitioner

contends the reasons given for the denial were not sufficient, particularly when weighed against his right to counsel. There was no evidence presented that the Board would be prejudiced by the delay.

The petitioner, on advice of his counsel, refused to participate in the proceeding (60 of 1983, N.T. 5, 26). The Board nevertheless proceeded with the evidence and took testimony of all the Board's witnesses without the petitioner being present and without the witnesses being examined.

The petitioner, at the request of his counsel, was given the opportunity to present a defense on May 19, 1983 with his counsel being present (60 of 1983, N.T. 185). The Board, on May 19, 1982, denied the request of his counsel to have the opportunity to cross-examine witnesses.

> "*Mr. Stretton:* . . . Just for the purpose of making the record, we would like to again request the opportunity to have these witnesses to cross-examine who testified at the first proceeding. I understand the Committee's prior rulings, but I would just like to make that request for the record, if I may.
>
> *The Chairman:* The Ruling would continue to be inconsistent with the prior ruling, and that is that opportunity had been presented." (60 of 1983, N.T. 186).

The petitioner contends he was severely prejudiced by the Board's failure to continue this matter at the request of his counsel. As a result, in a case where credibility was at issue, the petitioner was denied the opportunity to have his accusers cross-examined and confronted.

The Censor Committee Rules specifically provide for the petitioner to have counsel and the right to cross-examine witnesses.

> "Any person complained against shall have the right to defend against the charge by the introduction of evidence and *the right to be represented by counsel and to examine and cross-*

> *examine witnesses.*" Rule 11, Censor Committee Rules (emphasis added).

Further, the United States Supreme Court has specifically characterized attorney disciplinary cases as quasi criminal in nature. *In re Ruffalo,* 390 U.S. 544 (1968). Therefore, the petitioner would further contend in a quasi criminal setting he is entitled to have counsel pursuant to *Gideon v. Wainwright,* 372 U.S. 335, 83 Sup. Ct. 792 (1963) and its progeny. [*See also, In re Gault,* 387 U.S. 1, 87 Sup. Ct. 1428 (1967) establishing the right to counsel in juvenile proceedings.]

The Board's refusal to continue the first listing of the case when petitioner's counsel was unable to be present and had timely notified the Committee appears to violate Censor Committee Rule 11. This is particularly true when no showing or suggestion of prejudice to the Board was demonstrated.

The Board suggested the petitioner should have retained other counsel (60 of 1983, N.T. 8). This is unrealistic particularly since the Board was aware the petitioner's counsel was representing him in all pending matters, was someone who was familiar with the proceedings and someone the respondent obviously had confidence in.

> *Mr. Kennedy:* I agree. If I can make one more comment. This man is highly specialized in this area. He is in the area of disciplinary law. He is the only attorney that I would desire to represent me in this matter. In the absence of his presence, I feel that I would not be properly represented concerning this matter." (60 of 1983, N.T. 23).

Even if the petitioner's attorney could be criticized for allowing other court trials to be scheduled on the date of the petitioner's hearing, the petitioner should not be penalized for the "sins" of his attorney. Since the petitioner's attorney made the continuance request on April 5, 1982, it is unlikely there would have not been enough time for another attorney to be fully prepared to proceed even if the petitioner had attempted to seek other counsel.

Although in a criminal case the United States Supreme Court rejected the concept that a criminal defendant is entitled to a

meaningful attorney-client relationship, the facts of that case are far different that the petitioner's. *Morris v. Slappy*, ____ U.S. ____, 103 S. Ct. 1610 (1983). In *Morris* the criminal defendant was assigned another public defender after his assigned defender was hospitalized. The record clearly indicated the new defender was prepared for trial. The petitioner in the present matter had retained private counsel. There was no other attorney available. The United States Supreme Court in *Morris* discussed when a continuance should be granted.

> "Consequently, broad discretion must be granted trial Courts on matters of continuances; only an unreasonably and arbitrary 'insistence *upon expeditiousness in the face of a justifiable request* for delay' violates the right to the assistance of counsel." *Id.* at 1616 (emphasis added).

The language of the United States Supreme Court is particularly pertinent since the Board used the need to be expeditious as the main basis for the denial (60 of 1983, N.T. 7). The United States Supreme Court suggests the defendant's requests for continuance "were not made in good faith but were a transparent play for delay." *Id.* at 3017. The petitioner in the present matter could hardly be accused of bad faith when his sole reason was to have his counsel present who represented him in all pending disciplinary matters. Also, the petitioner's counsel made the April 15 and April 19, 1982 Disciplinary Hearings (*see* Exhibit R-1 where continuances were requested in all three cases) when the continuances were denied. The fact he made the other hearings suggests he was acting in good faith and was unable to be present on April 22, 1982 despite his best efforts.

The Superior Court of Pennsylvania in a criminal case recommended a balancing test be applied.

> "Each of these Pennsylvania cases makes it clear that there is indeed a right to counsel of one's choice, but that right is not absolute, yet the defendant's need for time to acquire his own counsel must be weighed against the public need for the efficient administration of justice." *Commonwealth v. Wolfe*, ____ Pa. Superior Ct. ____, 447 A. 2d 305, 309 (1982).

The Pennsylvania Superior Court emphasized an inquiry should be made. In that case, the defendant's counsel withdrew during trial since he believed the defendant was going to commit perjury. The lower court denied a continuance for the defendant to get new counsel.

> "Since no inquiry was made as to the probable length of time needed for the Defendant to reappear with private counsel, we cannot say that any balancing of competing interests could have properly been made. . . . We are unable to conclude on this record that the exercise of the Defendant's limited right would have unduly disrupted the administration of criminal justice. Accordingly, we must conclude that the denial of the request for time and opportunity to acquire counsel of Defendant's own choosing, on these facts, constituted an abuse of the lower Court's discretion." *Id.* at 311.

In the present case, there was no inquiry by the Board as to the time needed either for a new counsel or for the petitioner's counsel to be present. Further, this disciplinary trial was the third within seven days. Trials were held on April 15 and April 19, 1982 where the petitioner's counsel attended (*see* Exhibit R-1). The scheduling of three serious disciplinary matters within a seven day period is another factor which must be considered and which was not. The request for a continuance for a first time listing does not appear unreasonable in this context and should have been granted.

The prejudice to the petitioner in denying him his counsel was substantial. The petitioner essentially testified to a different version than his accusers, therefore, the need to test the credibility of the complaining witnesses through cross-examination became critical. Any doubt the petitioner was able to represent himself disappears when one views how excited and emotional the petitioner became when requesting a continuance during the April 22, 1983 hearing (60 of 1983, N.T. 2-47). Clearly, his state of mind was such that he could not effectively represent himself. During the May 19, 1982 hearing with his counsel present, the petitioner apologized.

> *"Mr. Kennedy:* At the last convening of this Committee of course you weren't present, and at that time I was unrepresented. I wrote certain positions concerning my request for a continuance until you would be present. If I appeared to be a little upset with respect to my request for applications, I would apologize to this Committee. My intent at that time was merely to be a request for a continuance, and if I appeared to be a little upset and a little harsh, I felt that I had a great deal at stake inasmuch as I have my license to practice law at stake, and I apologize if there was any and if any language was a little harsh or abusive at the time. But I was upset." (60 of 1983, N.T. 208, 209).

The United States Supreme Court has recognized the importance of cross-examination in *Goldberg v. Kelly,* 397 U.S. 254, 90 Sup. Ct. 1011 (1970) in an administrative proceeding involving termination of welfare benefits.

> "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross examine adverse witnesses.
>
> > 'Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on factfindings, the evidence used to prove the government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice or jealousy.

> We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the sixth amendment. . . . This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases but also in all types of cases where administrative . . . actions were under scrutiny.'
>
> Welfare recipients must therefore be given an opportunity to confront and cross-examine the witnesses relied on by the Department." *Id.* at 1021.

In *Willner v. Committee on Character and Fitness*, 373 U.S. 96, 83 Sup. Ct. 1175 (1962), the United States Supreme Court considered whether a person seeking admission to the practice of law was entitled to confront his accusers. In language analogous to the present matter, the Court said he did.

> "We have emphasized in recent years that procedural due process often requires confrontation and cross-examination of those whose words deprive a person of his livelihood." *Id.* at 1180.

The petitioner contends he was denied the opportunity to cross-examine when his continuance was denied.

The Supreme Court of Michigan in a disciplinary case, allowed the attorney a new trial where a transcript from an earlier proceeding was utilized in lieu of a witness testimony.

> "We find that the hearing at which the Respondent was unable to cross-examine the complaining witness lacked fundamental fairness. While it is true that the Respondent examined the complaining witness at the first hearing, he did not have the benefit of the trial transcript at that time." *In re Murphy*, ____ Michigan Sup. Ct. ____, 198 N.W. 2d 289 (1972).

In a case similar to the present matter, the California Supreme Court indicated an attorney was denied his right to due process where his request for a continuance and appointment of counsel was denied and the trial proceeded without the attorney being present.

> "State Bar Disciplinary proceedings are administrative in nature but have been denominated 'quasi criminal' adversary proceedings. . . . Using its inherent supervisory powers, this Court has referred to and applied such rules of procedure to ensure a fair hearing." *Giddens v. State Bar of Cal.*, ____ Sup. Ct. ____, 621 P. 2d 851 (1981).

The petitioner contends he was denied his right to counsel and his right to due process by the arbitrary denial of his request for a continuance resulting in the trial proceeding without his counsel present and the opportunity to adequately confront witnesses.

V.

The petitioner was denied his right to due process since he was not given the opportunity to present evidence as to the nature of the discipline to be imposed.

The petitioner in the four pending disciplinary proceedings vigorously contested the findings of violations. The Board on Professional Responsibility by its rules does not impose discipline but only submits a general recommendation that discipline be imposed if there is a finding of violation. The four hearings given the petitioner were on the issue of whether he should be disciplined, not on the issue of the nature of discipline.

The petitioner vigorously challenged the findings of violation before the Supreme Court of Delaware. The Delaware Supreme Court then imposed the discipline of a two-year suspension without giving the petitioner the opportunity to present evidence on the type of discipline.

For instance, the Delaware Supreme Court, in its opinion imposing two years of suspension gave great consideration to the

petitioner's failure to cooperate with the Board on the eleven cases in 75 of 1983. What was not known to the Supreme Court of Delaware was the petitioner had cooperated with the Board subsequently on these matters resulting in the dismissal of many. Without a hearing, the petitioner had no means to present this information to the court for consideration. This example emphasizes the fundamental denial of due process without a hearing.

The United States Supreme Court in *Willner v. Committee in Character and Fitness,* 373 U.S. 96, 83 S. Ct. 1175 (1963) considered the factual situation where an attorney had passed the bar examination but had been denied admittance without a hearing.

> "Moreover, the requirements of procedural due process must be met before a state can exclude a person from practicing law. We have emphasized in recent years that procedural due process often requires confrontation and cross-examination of those whose would deprive a person of his livelihood." *Id.* at 1179-1180.

Various state courts have acknowledged the need for complete evidentiary hearings in an attorney disciplinary proceeding. Although those cases went to the issue of a finding of violation, the petitioner contends the same rationale applies to a hearing on the actual nature of the discipline to be imposed. *See Giddins v. State Bar of California,* ____ Cal. Sup. Ct. ____, 621 P. 2d 841 (1981); *In re Murphy,* ____ Mich. Sup. Ct. ____, 198 N.W. 2d 289 (1972); *Matter of Thorup,* ____ D.C. App. ____, 432 A. 2d 1221 (1981).

The sentencing state in a criminal proceeding is considered to be a critical stage of the process [*see United States v. Green,* 680 F. 2d 183 (D.C. Cir. 1982), *cert. denied,* 103 S. Ct. 1204 (1983)]. The analogy is drawn to the quasi criminal attorney disciplinary proceeding and the petitioner respectfully contends similarly he is entitled to a hearing at this stage with the right to have counsel present and the opportunity to introduce evidence.

The petitioner respectfully contends the procedure used in the State of Delaware in attorney disciplinary proceedings was

defective since it never provided him with the opportunity to have a hearing on the nature of the discipline once there was a finding of violation.

CONCLUSION

The petitioner, by his counsel, respectfully requests this Honorable Court grant certiorari in the present matter.

Respectfully submitted,

SAMUEL C. STRETTON
Attorney for Petitioner

APPENDIX A — OPINION AND ORDER OF THE SUPREME COURT OF DELAWARE DATED JANUARY 24, 1984

IN THE SUPREME COURT OF THE STATE OF DELAWARE

Nos. 204 & 205, 1982
Nos. 60 & 75, 1983

IN RE: JOHN B. KENNEDY, Esquire, a member of the Bar of the Supreme Court of the State of Delaware.

Submitted (Nos. 204 & 205, 1982) : April 11, 1983*
Submitted (Nos. 60 & 75, 1983) : October 17, 1983
Decided : January 24, 1984

Before McNEILLY, HORSEY and MOORE, Justices.

Proceeding upon Final Reports of the Board on Professional Responsibility.

O. Francis Biondi (argued), Wilmington, for the Board on Professional Responsibility as to Nos. 204, 1982 and 60, 1983.

F. Alton Tybout (argued), Wilmington, for the Board on Professional Responsibility as to Nos. 205, 1982.

Walter S. Rowland (argued), Wilmington, for the Board on Professional Responsibility as to No. 75, 1983.

Samuel C. Stretton (argued), West Chester, Pennsylvania, for the respondent.

McNEILLY Justice:

Several matters concerning John B. Kennedy, a member of the Bar of the State of Delaware, are before the Court for decision.

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* Issuance of a decision in Nos. 204 and 205, 1982, submitted on April 11, 1983 was deferred until this time in order for the Court to address the common issues of law raised in Nos. 60 and 75, 1983, submitted on October 17, 1983.

Appendix A

I.

The Board on Professional Responsibility (hereinafter "Board"), an agency of this Court created under Supreme Court Rule 62, has held hearings involving separate charges of professional misconduct against Kennedy and has filed four Final Reports stating findings of fact and conclusions of law. The Reports are as follows:

As to representation of Karen Everett (No. 204, 1982)

FINDINGS OF FACT

1. In the latter part of 1978, you were retained by Karen Everett to represent her in the Family Court of the State of Delaware in connection with a divorce, support proceedings, property division and a request for alimony from her husband, Joseph Everett.

2. On October 31, 1979, the hearing on the applications for alimony and attorney's fees was held. Immediately prior to the hearing, your failure to file an affidavit of dependency, as required by 13 Del. C. §1512(a), was raised by the husband's counsel. Nevertheless, you did not put an affidavit in the record but argued that this was not necessary so long as the subject was covered by the testimony of your client.

3. On January 7, 1980, Judge Horgan rendered a written decision and order denying alimony to your client on the ground that the court lacked jurisdiction because you failed to file the affidavit of dependency as required by 13 *Del.C.* §1512(a), and denying the application for attorney's fees to be awarded to your client against her husband on the ground that the affidavit you submitted in support of the application for attorney's fees was insufficient.

4. When the decision of Judge Horgan referred to in paragraph 3 above was received by you, you failed to take the

necessary steps to remedy the procedural deficiencies you had caused to prevent loss or further delay or expense to your client. Specifically:

A. You made no motion for reargument, nor did you attempt to seek to cure the deficiency in your affidavit on attorney's fees.

B. You refused to discuss the decision on the telephone with Karen Everett, and did not arrange to meet with her in your office until the time for reargument had passed and her rights were further injured or delayed.

C. On February 4, Karen consulted Roderick McKelvie, Esquire, who recommended that she have you file a protective appeal and then bring the file to him for review. You refused to prepare or file the one-page notice of appeal unless paid in advance for that service.

5. You then refused to turn over the file or make it available when requested by the client, under the following circumstances:

A. Mrs. Everett told you she wished to terminate your services and retain Mr. McKelvie to pursue an appeal. McKelvie requested the file from you by telephone before the notice of appeal was prepared and wrote a letter to you on February 12, 1980, requesting an opportunity to review the file.

B. You refused to release the file on the ground that Karen Everett still owed you attorney's fees.

C. Nevertheless, you refused a request to submit a statement to Karen Everett for the attorney's fees you claimed to be due.

Appendix A

D. Subsequently you refused to release the file to Karen Everett unless she first signed a general release to you and paid a $40 charge for photocopying, even though Mrs. Everett told you they were necessary to permit her new attorney to pursue her appeal.

E. You did not release these papers until Henry Herndon, Esquire, then Chairman of the Censor Committee, and Victor F. Battaglia, Esquire, then President of the Bar Association, intervened on her behalf in March, 1980.

CONCLUSIONS OF LAW

1. The actions described in paragraphs 1 through 5 of the Findings of Fact are in violation of DR6-101(A)(2) and (3) and DR7-101(A)(1) and (2) of the Code of Professional Responsibility.

2. The conduct described in paragraph 5 of the Findings of Fact was in violation of DR2-110(a)(2) of the Code of Professional Responsibility.[1] As to representation of Robert A. Book (No. 205, 1982).

---

1. The Code of Professional Responsibility provides as follows:

DR6-101(A)(2) & (3)

(A) A lawyer shall not:

• • •

(2) Handle a legal matter without preparation adequate in the circumstances.

(3) Neglect a legal matter entrusted to him.

DR7-101(A)(1) & (2)

(A) A lawyer shall not intentionally:

(Cont'd)

Appendix A

FINDINGS OF FACT

1. Robert A. Book suffered a personal injury while working as a groundsman at the Valley Run Apartment complex on July 28, 1980. Mr. Book believing the accident to be a direct result of negligence on the part of his employer, Gilpin, Vantrump, and Montgomery, contacted John B. Kennedy, Esq. on July 29, 1980 and received legal services. Mr. Kennedy agreed to represent Mr. Book and presented to Mr. Book a "contingent fee contract" obligating Mr. Book to pay Mr. Kennedy forty percent (40%) of any settlement "made by me (Book) directly or through John B. Kennedy together with cost of any necessary action." If there were to be an appeal to the Superior Court or the Supreme Court

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(Cont'd)

(1) Fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules, except as provided by DR7-101(B). A lawyer does not violate this Disciplinary Rule, however, by acceding to reasonable requests of opposing counsel which do not prejudice the rights of his client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process.

(2) Fail to carry out a contract of employment entered into with a client for professional services, but he may withdraw as permitted under DR2-110, DR5-102, and DR5-105.

DR2-110(a)(2)

(A) In general.

* * *

(2) In any event, a lawyer shall not withdraw from employment until he has taken reasonable steps to avoid forseeable prejudice to the rights of his client, including giving due notice to his client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled and complying with applicable laws and rules.

in the course of the litigation, the contingent fee would be raised to forty-eight percent (48%) of any recovery. In the section of the agreement or contract entitled "Special Agreements", Mr. Kennedy's handwriting adds "this agreement pertains to all compensation including total temporary disability payments, permanency, etc., which is recoverable by client. This contract pertains only to Workman's Compensation case against Gilpin." The agreement is dated July 29, the year is blank. It is apparent that this handwritten portion of the agreement was read by Mr. Book. The initials KAB appear in the section of the handwritten portion of the agreement.

2. Mr. Kennedy contacted Mr. Book's employer stating his client's position to be that he is entitled to Workman's Compensation relief and requested that the letter be considered a claim to be forwarded to the Company's Workman's Compensation insurance carrier. Mr. Kennedy scheduled an appointment with an orthopedic surgeon for an examination of Mr. Book. Mr. Kennedy solicited and received from Mr. Book a handwritten statement of how the accident occurred and took notes on his interview with Mr. Book. A medical authorization and an authorization to request employment records was obtained from Mr. Book. Mr. Kennedy wrote the Silverside Medical Center for reports concerning Mr. Book's injuries. On August 5, 1980, Mr. Kennedy was informed by Gilpin that they recognized he was entitled to relief under Workman's Compensation insurance. The first temporary total check was sent by Aetna Life and Casualty, the Workman's Compensation carrier, on August 13, 1980. An Agreement as to compensation was prepared and signed by Mr. Book on or about August 13, 1980. On July 29, 1980, Mr. Kennedy prepared and mailed on July 31, 1980 a Petition to Determine Compensation Due to Injured Employee with the Industrial Accident Board. In that Petition, Mr. Kennedy alleged that Mr. Book and his employer had failed to reach an agreement in regard to compensation due him as an employee of Gilpin, Vantrump, and Montgomery, Inc. On July 29, 1980, Mr. Kennedy had Mr. Book sign a Power of Attorney granting Mr. Kennedy full rights to collect, sign, and deliver checks and to deposit or

withdraw money from all of Mr. Book's checking and savings accounts. Mr. Book tendered $100 cash to Mr. Kennedy for expenses. However, Mr. Kennedy has no record of receipt of the payment. We find that Mr. Kennedy has no record keeping system in place to document cash receipts for attorney's fees.

3. On August 15, 1980, Mr. Book was informed by Mr. Kennedy that a check had come to his office and that Mr. Book could come in and pick it up. The temporary total payment to Mr. Book was a bi-weekly payment in the amount of $166.16, however, Mr. Kennedy delivered a check to Mr. Book for $83.08, which was exactly one-half of Mr. Book's entitlement. Mr. Kennedy explained that a portion of the check was taken to pay for the orthopedic examination and report. On September 2, 1980, Mr. Book went to Mr. Kennedy's office to pick up an additional disability check. The check again was in the amount of $83.08, one-half of Mr. Book's entitlement. Mr. Kennedy then informed Mr. Book that there was no mistake because he would be taking fifty percent (50%) of the temporary total disability check as legal fees. Testimony revealed that Mr. Kennedy had altered the prior "contingent fee agreement" because Mr. Book could not advance costs. Mr. Kennedy increased the contingent fee from forty percent (40%) to fifty percent (50%) and stated he would cover the costs of the litigation in exchange for the increase in the contingent fee.

4. Mr. Elder of Aetna testified that Mr. Kennedy's input in two telephone calls to the company had no affect on the company's decision to pay temporary total. Aetna never challenged nor disputed Mr. Book's right to temporary total payments. Based on the statements of Mr. Book's employer, Gilpin, and the insurance carrier, we find there was never a dispute over compensation for temporary total disability under the Workman's Compensation statute. We further find that in addition to the contingent fee arrangement entered into between Mr. Book and Mr. Kennedy, Mr. Kennedy charged $10 per consultation on each of two separate occasions. We further find that an additional $100 was delivered by Mr. Book to Mr. Kennedy upon his second visit to Mr. Kennedy for consultation obstensibly for physician's fees.

Appendix A

5. Testimony of Morton Kimmel, an experienced Workman's Compensation plaintiff's attorney, established a standard in the community whereby practice in New Castle County of attorneys experienced in temporary total disability claims is to charge no fee where there is no dispute and no litigation on a temporary total issue. Further, the practice generally is to conform to the Board's standard set forth in 19 *Del.C.* §2127 whereby thirty percent (30%) or $2,250, whichever is less, is a standard fee for permanency recoveries.

6. There is no evidence of any substantial amount of time expended by Mr. Kennedy on Mr. Book's behalf in regard to temporary total disability or that any legal effort was involved in establishing Mr. Book's right under the Workman's Compensation statute to receive temporary total disability payments. There is no evidence that Mr. Kennedy's activity on behalf of Mr. Book precluded him from representation of other clients in unrelated matters. We find that Mr. Kennedy's efforts were insignificant and/or unrelated to the decisions of the employer and the employer's insurance carrier to pay Mr. Book temporary total disability. We find there were no significant time limitations imposed by Mr. Book on Mr. Kennedy and in fact no need for the filing of the Petition before the Industrial Accident Board as soon as July 29, 1980. We find that neither Mr. Kennedy's performance, experience, reputation, nor ability had any affect on the fee arrangement entered into in regard to its amount or duration. We find that assessment of a fifty percent (50%) fee against a temporary total disability payment to be an alleged "contingent fee" recovery when in fact payments were not contingent upon any litigation or resolution of any issue of fact or law.

III

CONCLUSIONS OF LAW

Respondent has violated Disciplinary Rule 2-106(A) by charging a clearly excessive fee to Mr. Book. Assessing fifty percent

(50%) of a temporary total disability check as an attorney's fee with or without the existence of a purported contract involving the consent of the client is in fact establishing and collecting a fee that is clearly excessive as a matter of law. The guidelines established in DR2-106(B) when applied to the facts found by the panel show that none of the factors involved existed in Mr. Kennedy's professional relationship with Mr. Book. Testimony established that a fifty percent (50%) contingent fee for a clear entitlement to temporary total disability without any requisite litigation or resolution of issues of fact or law is substantially in excess of the fee customarily charged in this state for the recovery of temporary total disability payments. We conclude that the facts established that no substantial amount of time or legal effort was entailed in obtaining temporary total disability compensation for Mr. Book. We find that the representation of Mr. Book did not preclude Mr. Kennedy from any other employment. We conclude that Mr. Kennedy achieved no significant results as a result of his representation of Mr. Book. We conclude that time was not a significant factor in Mr. Kennedy's efforts and that there was no other professional relationship between Mr. Kennedy and the client to justify imposition of a fifty percent (50%) contingent fee. Mr. Kennedy's experience, reputation, and ability were not factors in calculating the fee since there was really no legal effort involved whatsoever in obtaining the temporary total disability. The absence of an issue of law or fact that would make the entitlement contingent upon legal efforts on Mr. Book's behalf removes any consideration of the fee assessed as a "contingent fee." The fee as assessed by Mr. Kennedy was a fixed fee automatically charged to a temporary total disability check and not contingent upon recovery of a sum uncertain. Assessment in addition to the alleged contingent fee of a $10 consultation fee for each office visit further underscores the excessiveness of the fee. While there seems to be some confusion in the mind of the complainant about the applicability of the contingent fee to Workman's Compensation payments or to a third party liability suit, it is clear that Mr. Kennedy assessed the fee against a fixed certain entitlement to temporary disability payments and not against an uncertain

recovery from litigation. We must, therefore, conclude, that Mr. Kennedy entered into an agreement for a clearly excessive fee, charged, and in fact collected a clearly excessive fee in violation of DR2-106(A).[2] As to representation of Clara Tingle (No. 60, 1983).

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2. The Code of Professional Responsibility provides:

DR2-106(A) & (B)

(A) A lawyer shall not enter into an agreement for, charge or collect an illegal or clearly excessive fee.

(B) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:

(1) The time and labor required, the novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly.

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

(3) The fee customarily charged in the locality for similar legal services.

(4) The amount involved and the results obtained.

(5) The time limitations imposed by the client or by the circumstances.

(6) The nature and length of the professional relationship with the client.

(7) The experience, reputation and ability of the lawyer or lawyers performing the services.

(8) Whether the fee is fixed or conti igent.

Appendix A

COUNT I

Findings of Fact:

1. The Respondent represented one Ms. Clara Tingle before the Honorable Barbara C. Hughes, Justice of the Peace in Court No. 15 of the State of Delaware on May 28, 1981, for an alleged violation of 21 Del.C. §4177(a) (driving under the influence). Corporal Michael Gunning of the Delaware State Police presented the case at trial for the State.

2. Judge Hughes has been a Justice of the Peace since January 13, 1977.

3. After numerous continuances had been granted to the Respondent's client, the matter proceeded to trial on May 28, 1981, at J.P. Court No. 15 in New Castle, Delaware.

4. During the course of the trial, the Respondent continually interrupted the testimony of witnesses with objections made in a disorderly, excitable, demonstrative manner. Respondent would not allow witnesses called by him to answer questions directed to them. The Court cautioned the Respondent to allow the witness to answer questions but the Court's directions were ignored. The Respondent harrassed his own client on the stand to such an extent that she "broke down" and volunteered to "take anything", "do anything but you," (the Respondent), "get me out of here". Respondent's conduct in the Courtroom drove his own client to the "verge of hysteria." The Respondent during the course of the trial shouted and raised his voice to the witnesses and to the presiding Judge. At the conclusion of the trial, the State Police Officer representing the prosecution requested that the Court declare a mistrial based upon the behavior of defense counsel urging the Court to take the action because of the state of mind of the defendant in that she was not able to adequately defend herself and further on the basis that the Respondent had made a "total mockery of the system".

5. During the course of the hearing, the Respondent engaged in a yelling or shouting match with the prosecuting officer. The Judge left her chambers and instructed counsel to be quiet. During the course of testimony the Respondent attempted to intimidate witnesses by cutting off their answers, asking multiple questions persistently, and by arguing with their responses. Objections were made to testimony and Respondent interrupted any response from the State to the basis for his objection. When an attempt to respond to his objection was made he would interrupt the objection to further clarify and explain his own. During the course of objecting to answers by witnesses the Respondent would direct his argument and objections to the witness in the course of interrupting them rather than to the Court. During the course of the Respondent's examination of his own client, his client, because of his actions, requested that he "just sit down — you are making things worse". His client was shaken to the point of crying, breaking down emotionally, and requesting to plead guilty. The client's emotional condition directly caused by Respondent's actions in the Courtroom prompted the State to request a mistrial.

6. After considering the actions of the Respondent, the Court granted a mistrial.

7. After the mistrial and before a new trial had been scheduled Respondent presented an Affidavit to his client requesting that she "swear and say that she was happy with his services". The Defendant brought the Affidavit to the attention of the presiding Judge who suggested that it be taken to the Attorney General's Office.

Conclusions of Law:

9. DR 1-102 (A)(5) provides in defining misconduct that "a lawyer shall not: (5) engage in conduct that is prejudicial to the administration of justice."

The Committee unanimously finds that the Respondent has violated DR1-102 (a)(5) by conducting himself in an undignified,

discourteous, rude, and abusive manner to the witnesses during the course of the trial, to the opposing prosecutor for the State, and to the presiding Judge of the tribunal. The actions of the Respondent:

(a) in raising his voice in the Courtroom;

(b) by refusing to respond to the Court's demands that he state the basis for his objections;

(c) by interrupting, intimidating and cutting off witnesses before they finished their answers;

(d) by addressing arguments directly to witnesses instead of to the Court;

(e) by engaging in a yelling match with the prosecutor during a recess necessitating the presiding Judge to leave her Chambers and instruct him to be quiet; and

(f) by abusing his own client on the stand to such an extent that she begged for the opportunity to plead guilty just to get out of the Courtroom;

all constitute conduct prejudicial to the administration of justice. The culmination of the conduct resulted in a mistrial thereby frustrating the entire process made available for the protection of his client's rights and the prosecution of the public's interest.

COUNT TWO

Findings of Fact:

1. The Committee adopts the same facts found above particularly emphasizing the actions of the Respondent in refusing to follow the instructions of the Court. The Respondent's failure to treat the Court with decorum and courtesy by slamming books

on the table during the course of the trial, by raising his voice over the remonstrances of the Court all constitute the factual basis for finding undignified and discourteous conduct degrading to the Justice of the Peace Court.

Conclusions of Law:

2. The Committee, based upon the facts above, unanimously concludes that the actions of Respondent as described by all of the witnesses violate DR 7-106 (C)(6). The Respondent's conduct toward the Court, as an officer of the Court, directly related to a lack of responsibility and a total disregard of the respect an officer of the Court owes to the judiciary. The position of all persons present in the Courtroom on this particular evening were degraded and insulted by the actions of the Respondent. Therefore, the Panel concludes the facts are sufficient to find a violation of DR 7-106 (C)(6).

3. The Panel, therefore, concludes and recommends that the Respondent be disciplined for the above violations. In addition to the above, the Panel takes special note of the fact that on July 10, 1978, the Respondent by Order of the Supreme Court of the State of Delaware was publicly censored for similar violations arising from his conduct in a trial in the Alderman's Court of the Town of Newport. The Committee must therefore find that Respondent should be disciplined on a cumulative basis in that his actions reflect a pattern of conduct in violation of DR 1-102 and DR 7-106.[3]

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3. The Code of Professional Responsibility provides as follows:

DR7-106(C)(6)

In appearing in his professional capacity before a tribunal, a lawyer shall not:

* * *

(6) Engage in undignified or discourteous conduct which is degrading to a tribunal.

(Cont'd)

Appendix A

On March 1, 1983, the Board issued the following Final Report recommending that Kennedy be disciplined for his failure to respond to subpoenas issued and interrogatories directed to him by the Board in eleven (11) proceedings pending before the Board charging Kennedy with professional misconduct.

(No. 75, 1983)

1. The following constitutes the Board's findings of fact:

The Respondent was served subpoenas and interrogatories pursuant to Rules 8 and 13 of the Rules of the Board of Professional Responsibility[4] upon matters under preliminary investigation as follows:

Case No. 795 Sadie M. Smith	Served Jul. 12, 1982
Case No. 806 Josephine Smith	Served Jul. 12, 1982
Case No. 807 Louis F. Christo	Served Jul. 8, 1982
Case No. 808 Ida Warren	Served Sep. 23, 1982

(Cont'd)

DR1-102(A)(5)

A lawyer shall not:

* * *

(5) Engage in conduct that is prejudicial to the administration of justice.

4. Rule 8 of the Board on Professional Responsibility states that "[t]he Board may require any member of the Bar to answer written interrogatories propounded by it relevant to any matter which is the subject of an investigation or a preliminary or formal hearing."

Rule 13 provides for the issuance of "[s]ubpoenas for the attendance of witnesses and the production of books and records . . . "and" may, in the alternative, require the person to whom it is directed to make written answer to written interrogatories to be attached thereto."

Appendix A

Case No. 810 Rose Blanchfield	Served Sep. 23, 1982
Case No. 811 Olga Wright	Served Sep. 23, 1982
Case No. 816 Andre Brown	Served Sep. 23, 1982
Case No. 817 Charlotte Dennis	Served Sep. 23, 1982
Case No. 828 Jack Cullen	Served Sep. 23, 1982
Case No. 829 Judge Poppiti	Served Sep. 23, 1982
Case No. 836 Richard Billings	Served Sep. 23, 1982

The Respondent agrees that the subpoenas and interrogatories were served upon him at the times specified. There was an understanding between the Respondent's attorney and the Board chairman that requests for discovery be stayed until October 4, 1982. The special prosecutor for the Board agreed to extend the date for furnishing discovery to October 29, 1982.

The Respondent has failed to either respond to the interrogatories or to honor the subpoenas at any time subsequent to October 29, 1982. The Respondent has objected from the inception to the discovery on legal grounds. His reasons are set out in his Motion to Dismiss and Petition Requesting an Extension of Time and Requesting Certification of the Constitutionality of DR 1-103(c) and Rules 8 and 13 of the Board of Professional Responsibility.[5]

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5. The Code of Professional Responsibility provides:

DR1-103(c)

A lawyer under investigation by the Board on Professional Responsibility of the Supreme Court of Delaware shall, upon proper request of the Board on Professional Responsibility or an investigating member or subcommittee of the Board on Professional Responsibility, make available to the Board on Professional Responsibility, its investigating members and subcommittees and their agents all books, records and other documents which may be pertinent to the subject of the investigation and which may not properly be withheld on the ground of privilege.

Appendix A

The Respondent asserts he has the information requested in the hands of his attorney pending the outcome of these proceedings.

The Board determined that it is not an appropriate body to resolve the legal contentions asserted by the Respondent as a reason for refusing to comply with discovery under Rules 8 and 13 of the Board of Professional Responsibility. The Board determined that its sole function should be to determine whether Respondent has in fact refused to comply with the Rules of the Board of Professional Responsibility.

The following constitutes the Board's conclusions of law.

The interrogatories propounded to the Respondent requested relevant information to matters under investigation by the Board under Rule 8.

The Respondent failed to respond to subpoenas of the Board on Professional Responsibility in accordance to Rule 13.

The Board recommends that the Respondent be disciplined for his failure to respond to subpoenas issued and to answer interrogatories directed to him by the Board.

II

The first issue we address is Kennedy's denial that he violated any Disciplinary Rule. In Nos. 60, 204 and 205, Kennedy argues that the findings of fact and conclusions of law are incorrect because they are not supported by the evidence in the record. We are not persuaded that there is any merit to this argument.

Appendix A

To the extent creditibility was an issue, the Board resolved it and there is substantial evidence in the record to support the Board's findings and its conclusions of law. Accordingly, we confirm each Report as filed by the Board. See Supreme Court Rule 64. Further, the Board's conclusions of law based on its findings of fact are correct as a matter of law.

III

We next address Kennedy's contention in support of his appeal which he raises in all four cases that his right to due process has been violated by a commingling of the investigative, prosecutorial and adjudicative roles among the Board members and by the appointment by this Court of a Special Prosecutor. While Kennedy concedes that the Board Rules contain strict safeguards preventing the commingling of these three functions in the same proceeding and they were followed in each case,[6] it

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6. Rule 3 of the Board provides:

> All complaints against members of the Bar shall be in writing, shall set out with particularity the essential facts constituting the matter complained of, and shall be filed initially with the Chairman of the Board. In the event a complaint is made orally to any member of the Board, it shall be the duty of such member, or some other member of the Board to be designated by the Chairman for the purpose, to assist the complaining party or party acting on his behalf (hereinafter called the complainant) to put such complaint in writing. The member so assisting the complainant thereafter shall take no part in the deliberations or decision of the Board with respect to such complaint, but such member shall not be disqualified from being appointed a member of the subcommittee to make a preliminary investigation of the complaint in accordance with Rule 5 nor shall such member be disqualified from being appointed to formulate an order to show cause, to examine witnesses and present evidence of the charge before the Board as provided in Rule 6.

Rule 5 of the Board provides in pertinent part:

(Cont'd)

Appendix A

is his contention the Board Rules are unconstitutional because they do not prevent a Board member from presenting the evidence to the Board in one case arising out of one set of facts and sitting as an adjudicator and deciding another matter before the Board involving the same attorney but arising out of entirely separate

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(Cont'd)

> The Chairman may refer each complaint or investigation sua sponte to a subcommittee consisting of one or more members of the Board for preliminary investigation. The subcommittee shall investigate such complaint or other matter referred as fully as need be to determine the essential facts of the matter prima facie, and shall submit a report thereof to the Board with appropriate recommendations as to the disposition of the matter. The subcommittee may require the attendance of witnesses and production of documents by subpoenas and interrogatories directed to the lawyer being investigated or other witness. The person to whom the subpoena or interrogatories are directed may, at any time prior to the time stated therein for appearance, production or answer, apply to the full Board on Professional Responsibility for a protective order, and the Board on Professional Responsibility, for good cause shown, may quash or modify the subpoena or grant protective relief from the interrogatories. Upon receiving the subcommittee's report, the Board shall take such action in respect thereto as the facts and circumstances warrant. No member of the investigating subcommittee shall take part in the deliberations or decision of the Board with respect to such matter but members of the investigating subcommittee shall not be disqualified from being appointed to formulate an order to show cause, to examine witnesses and present evidence of the charge before the Board as proved in Rule 6.

Rule 6 of the Board provides in pertinent part:

> In the event the Board decides to hold a hearing in respect to any complaint or other matter brought to its attention, the Chairman of the Board shall appoint one of its members to formulate an order to show cause against the attorney and to examine the witnesses and present all evidence in support of the charges before the Board. Such member so appointed shall take no other part in the deliberations or decision of the Board in respect to such matter.

facts. Specifically, Kennedy argues that he was denied due process of law because the bias which Mr. Tybout acquired against him while investigating and presenting the evidence before the Board at the hearing in No. 205 prevented him from impartially sitting on the panel adjudicating No. 204. Kennedy makes the same argument with regard to Mr. Biondi's investigating and presenting evidence in No. 60 and sitting on the panel adjudicating No. 204. Additionally, Kennedy also argues that this Court's appointment of a Special Prosecutor in No. 75 not only exceeds the authority of the Court and its Rules, but asserts that "[t]he involvement of the Court in a prosecutorial decision is another example of the inherent taint present where there is a commingling of functions." We find these arguments to be without merit.

In *Withrow v. Larkin,* 421 U.S. 35 (1975), the United States Supreme Court rejected a physician's claim that proceedings before the medical examining board to revoke his license denied him due process of law because the same members both investigated and adjudicated the case. In *Withrow v. Larkin,* the Court stated:

> The contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication has a much more difficult burden of persuasion to carry. It must overcome a presumption of honesty and integrity in those serving as adjudicators; and it must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.
>
> Very similar claims have been squarely rejected in prior decisions of this Court. *Id.* at 47.

Appendix A

In Nos. 204, 205 and 206, Kennedy has presented no evidence to overcome this presumption of honesty and integrity other than to say conclusively that the participation of a Board member who acts in an adjudicative or investigative role in one proceeding and in a judicial role in another proceeding involving different facts is a violation of due process. In effect, Kennedy asks this Court to hold that it is a *per se* violation of due process for the Board to combine its investigative and adjudicative functions where the combination does not occur in the same proceeding but in different proceedings. This has never been the law, and we decline to adopt this approach. *See Withrow v. Larkin Id; Schweiker v. McClure,* ____ U.S. ____, 102 S. Ct. 1665 (1982); *Doralswamy v. Secretary of Labor,* 555 F.2d 832 (D.C. Cir. 1976).

Kennedy's attempt to distinguish *Withrow v. Larkin* on the ground that it allows the commingling of "investigative" and "adjudicative" roles but not "prosecutorial" and "adjudicative" is without merit in that the Board members act not as prosecutors but as investigators. Under Board Rule 5 the Board by subcommittee conducts a preliminary investigation to determine whether a rule to show cause should issue. If the Board determines that a rule to show cause should issue, a formal private hearing is held at which the Board member charged with investigating the complaint presents his findings. At that time, the respondent is given notice and a reasonable opportunity to present such matters as he may choose; at the formal hearing an opportunity to present evidence and cross examine witnesses is afforded. Rule 7. To quote the Supreme Court of Missouri:

> We are unable to conclude that this constitutes a prosecution as respondent contends even though the commission asks questions of the witnesses. Although an investigator is allowed to ask questions of witnesses, it does not necessarily make him a prosecutor. Using respondent's logic, we would have to conclude that every time a trial judge asked a witness a question to clarify a matter he would become a prosecutor.

Appendix A

Matter of Duncan, Mo. Supr., 541 S.W.2d 564, 568 (1976). In that the Board followed its rules and procedure and that no evidence has been offered rebutting the presumption of honesty and integrity, Kennedy's first argument must fall.

As to Kennedy's second contention concerning the appointment by this Court of a Special Prosecutor in No. 75 to handle a large volume of complaints against Kennedy, there is no merit to the argument that this Court exceeded its authority or became "tainted" in the adjudicative process in that the Special Prosecutor exercised no other function than that performed by an Associate Member of Board similarly appointed.[7] The fact that the Special Prosecutor carried a different title has no legal significance. Moreover, Kennedy's failure to object at the hearing to the subpoenas and interrogatories served on him by the Special Prosecutor requires a showing of prejudice suffered by him in order for his argument to succeed. Having failed to make such a showing, Kennedy was neither denied equal protection nor due process of law.

IV

Kennedy's next contention, raised in Nos. 60, 204 and 205, is that his due process rights have been violated in that hearsay evidence but not the results of a polygraph examination was

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7. Walter S. Rowland, Esq., who was neither a Member nor an Associate Member of the Board during the investigation of any of the complaints against Kennedy was appointed by this Court to serve as a "Special Prosecutor" for two reasons: One, to handle and coordinate the unusually large number of complaints against Kennedy, and two, to allay the grievances asserted by Kennedy in other cases regarding the commingling of "investigative" and "adjudicative" functions of Board Members assigned to individual complaints. Rowland's subsequennt appointment to the Board as an Associate Member by Order of this Court dated July 8, 1983 has no further bearing in this regard to complaints against Kennedy or any other Respondent since amended Board Rules 5 and 6, effective June 8, 1983, permits Associate Members to only investigate complaints and present their findings to the Board who alone decides or adjudicates as to the merits of the complaint.

admitted by the Board pursuant to Board Rule 9. We find this argument to be without merit.

The Board is an agency of this Court, and its proceedings can be properly classified as administrative in nature. The Board's Rule 9 provides:

> All witnesses shall be sworn in all proceedings hereunder. The rules of evidence applicable to the Superior Court of the State of Delaware shall be followed as far as practicable, provided that evidence may be admitted and considered which possesses probative value commonly accepted by reasonably prudent men in the conduct of their affairs.
>
> Where the respondent is or has been a party to a proceeding, whether criminal, civil, administrative or otherwise, the relevant portions of the transcript of the proceedings, exhibits, findings of fact, conclusions of law, opinions, decisions, and judgments, shall be admitted in evidence, and shall be accorded such weight as the Board shall deem appropriate; provided, however, that proof of a conviction of the respondent for any crime shall be conclusive evidence of the commission of that crime.

Rule 9, which was approved by this Court, by its terms allows evidence to be admitted which is hearsay so long as it "possesses probative value commonly accepted by reasonably prudent men in the conduct of their appeal". The Due Process clause has never been read to mean that the admission of hearsay evidence in an administrative type proceeding is a violation of that clause, and we decline to accept that reading today. *See Consolidated Edison Co. v. National Labor Relations Board,* 305 U.S. 197 (1938); *Richardson v. Perales,* 402 U.S. 389 (1971); *Schaefer v. United States,* 633 F.2d 945, 952 (Ct. Cl. 1980); *Smith v. Edmeston,* 431

F. Supp. 941, 946 (W.D. Tenn. 1977). Moreover, even if the strict rules of evidence should have been followed, reversal would not be warranted notwithstanding the hearsay because we find sufficient competent evidence with probative value in the record to support the Board's decision. *Geegan v. Unemployment Compensation Commission,* Del. Supr., 76 A.2d 116 (1950).

As to Kennedy's contention in No. 60 that "the Board erred since it did not uniformly apply the lesser evidentiary standard" in admitting hearsay evidence while denying his request that the witnesses submit to polygraph examinations and the results of which be admitted into evidence, we fail to find that a "double standard" has been applied. First, the Board never attempted to admit the results of a polygraph examination against Kennedy. Second, the Board committed no error by denying Kennedy's request in that this Court has recognized that "[p]olygraph examinations are generally held inadmissible for any purpose because their scientific reliability has not been established." *Foraker v. State,* Del. Supr., 394 A.2d 208 (1978). Since it has been shown that the admissibility of hearsay evidence and denial of polygraph results does not create a double standard, Kennedy was not denied due process of law.

V

We now turn to Kennedy's arguments raised in Nos. 205 and 75 that Disciplinary Rule 2-106 is unconstitutionally vague and that the vagueness of the discovery provisions of the Rules denied him due process.

The United States Supreme Court has recently articulated the task a court must perform in dealing with a facial challenge based on the vagueness of a law. In *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* ____U.S.____, 102 S. Ct. 1186, 1191, 1193 (1982), the United States Supreme Court stated:

> In a facial challenge to the overbreadth and vagueness of a law, a court's first task is to

> determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, then the overbreadth challenge must fail. The court should then examine the facial vagueness challenge and assuming the enactment implicates no constitutionally protected conduct, should uphold the challenge only if the enactment is impermissibly vague in all of its applications. A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others. A court should therefore examine the complainant's conduct before analyzing other hypothetical applications of the law. (footnotes omitted)
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> * * *
>
> A law that does not reach constitutionally protected conduct and therefore satisfies the overbreadth test may nevertheless be challenged on its face as unduly vague, in violation of due process. To succeed, however, the complainant must demonstrate that the law is impermissibly vague in all of its applications.

In that the challenged law does not interfere with constitutionally protected conduct, *see Papachristou v. City of Jacksonville*, 405 U.S. 156, 92 S.Ct. 839 (1972); *Grayned v. City of Rockford*, 408 U.S. 104, 92 S.Ct. 2294 (1972), the analysis outlined in *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.* is applicable. Applying this analysis to the instant case, Kennedy cannot be heard to complain that DR2-106 is vague in that his conduct in the instant case is clearly proscribed by the Disciplinary Rule.

Disciplinary Rule 2-106(A) provides:

Appendix A

> "A lawyer shall not enter into an agreement for, charge or collect an illegal or clearly excessive fee."

The rule then provides a guideline for determining an excessive fee in subsection (B) which provides:

> "A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:
>
> "(1) The time and labor required, the novelty and difficulty of the questions involved and the skill requisite to perform the legal services properly.
>
> "(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will include other employment by the lawyer.
>
> "(3) The fee customarily charged in the locality for similar legal services.
>
> "(4) The amount involved and the results obtained.
>
> "(5) The time limitation imposed by the client or by the circumstances.
>
> "(6) The nature and length of the professional relationship with the client.
>
> "(7) The experience, reputation and ability of the lawyer or lawyers performing the services.
>
> "(8) Whether the fee is fixed or contingent."

In its report, the Board applied these factors and found among other things that: (1) no substantial amount of time or legal effort was entailed; (2) the representation of Mr. Book did not preclude Kennedy from accepting other employment; (3) the 50% contingent fee in this type of case was substantially in excess of the fee customarily charged in this state; (4) Kennedy achieved no significant results as a result of his representation of Mr. Book; (5) there were no time limitations imposed; (6) there was no other professional relationship between Kennedy and Mr. Book; and (7) Kennedy's experience, reputation, and ability were not factors in calculating the fee since there was really no legal effort involved in obtaining the benefits. Given our conclusion that these findings are supported by sufficient evidence in the record, we find that this fee arrangement is clearly the kind of arrangement proscribed by DR2-106, and as such the rule is not impermissibly vague in all of its applications.

As to the vagueness of the discovery rules, Kennedy contends that since there are no specific provisions for reciprocal discovery rights under Rules 8 and 13 of the Board, those discovery rules are unconstitutional under the Due Process Clause of the United States Constitution. This argument, however, fails to recognize that other Rules of the Board are specifically tailored to afford a respondent discovery rights and protection. For instance, Rule 11 provides that:

> [a]ny person complained against shall have the right to defend against the charge by the introduction of evidence and the right to be represented by counsel and to examine and cross-examine witnesses. He shall also have the right to the issuance of subpoenas for the attendance of witnesses to appear and testify or for the production of books and records.

Similarly, Rule 10 gives a respondent the right to seek an appropriate order to compel "the testimony of a witness residing outside the State by deposition or otherwise". Furthermore, a

respondent under Rule 5 may apply "to the full Board . . . for a protective order and the Board . . . ., for good cause shown, may quash or modify the subpoena or grant protective relief from the interrogatories". Therefore, we find no merit to Kennedy's argument that the discovery provisions of the Board are one-sided in violation of his right to due process.

VI

We turn now to Kennedy's contention in No. 60, 1983 that the Board's refusal to continue the case denied his right to counsel, his right to confront witnesses and consequently, his right to a fair trial.

At the outset, we note that a discretionary ruling by a trial court or administrative body on a motion for a continuance will not be set aside unless that decision is unreasonable or capricious. *Raymond Heartless, Inc. v. State*, Del. Supr., 401 A.2d 921 (1979); *Blackledge v. Com. Pennsylvania State Police*, Pa. Cmwlth., 435 A.2d 309 (1981). Turning to the facts surrounding the request for a continuance, we see that the continuance was requested because of scheduling conflicts of Kennedy's attorney. We note, however, that Kennedy had notice of the possible charges against him approximately six months before the hearing was actually scheduled, and no request for a continuance was made within one month of having received notice that the hearing date had been set. In addition, we find that the alleged scheduling conflicts of Kennedy's lawyer arose after the hearing date was set. Therefore, absent constitutional infirmities, the Board did not abuse its discretion in denying the continuance.

Kennedy's argument that the Board's determination denied him his constitutional right to counsel is without merit. The right to counsel does not mean an absolute right to particular counsel of one's choice. For instance, in *Hodge v. Hodge*, 507 F.2d 87 (3rd Cir. 1974), the Third Circuit Court of Appeals held that:

> [t]he refusal to grant a continuance is not, without more, a denial of the right to counsel even though the refusal prevents a party from being represented by a particular attorney because of that attorney's other professional commitments. [cites].
>
> * * *
>
> The rule in this circuit . . . is that 'although the right to counsel is absolute, there is no absolute right to a particular counsel.' Id. at 90.

Since Kennedy had two weeks notice that his request for a continuance had been denied, we find he had ample opportunity to obtain other counsel. In addition, due to our determination that the facts and issues in the case were relatively uncomplicated and at the same time not novel, or requiring particular expertise, we find that substitute counsel could reasonably prepare for the hearing in the two week period.

As to Kennedy's claim that he was denied the right to confront witnesses against him, a ruling in his favor would ignore the fact that he chose to leave the hearing voluntarily even in the face of a subpoena commanding him to appear and testify. Overall, we cannot find a violation of Kennedy's right to a fair trial when Kennedy elected to neither obtain counsel nor confront witnesses by his decision to leave the hearing.

VII

Kennedy's final two allegations, arising in reference to No. 75, argue that he was denied due process of law since he was never notified he was being charged with a disciplinary violation and the discipline recommended by the Board was unwarranted because he relied upon the advice of counsel in an alleged good faith challenge to the discovery rules. We find that neither contention has merit.

Appendix A

First, we note that the subpoenas served on Kennedy stated that a failure to respond might constitute contempt of this Court. In addition, the Final Report in regard to this matter recommended discipline for a finding of contempt of this Court in failing to answer subpoenas and interrogatories not a recommendation for discipline based upon a finding of a disciplinary violation under the Code of Professional Responsibility. Therefore, Kennedy's first argument must fall.

Second, Kennedy's contention that he acted in good faith reliance on the advice of his attorney in not responding to interrogatories and depositions is not supported by the record. Unlike the situation in *In re Kennedy*, Del. Supr., 429 A.2d 987 (1981), where this Court upheld Kennedy's good faith challenge to production of records involving the Clients' Security Trust Fund, Kennedy completely ignored Rule 5 which was pertinent to this case and never sought a protective order from the full Board anytime during the five-month period between July 9, 1982, when he was served the earliest set of subpoenas and interrogatories in this matter, and December 8, 1982, when the hearing took place. Rather, he attempted to raise constitutional challenges to the discovery provision by petitioning this Court for a continuance on December 1, 1982 and upon denial of his request, raising them before the Board at the December 8, 1983 hearing. Based upon Kennedy's failure to adhere to the Rules as set forth by this Court, we find that he is barred from alleging a good faith argument in support of his position.

VIII

Having affirmed the findings of the Board, this Court must now turn its attention to what disciplinary action, if any, must be taken to protect the public and uphold the integrity of the Bar. Generally, measures imposed for professional misconduct include private reprimand, public reprimand, suspension, and disbarment. Several factors, however, must be considered whenever the Court undertakes this task.

First, the fact that the Board issued final reports in all the matters presently before the Court indicates that the Board was either expressly or impliedly of the opinion that more than a private censure was required. *See* Supreme Court Rule 63(d)(i). Second, "any [prior] discipline or admonition of a respondent by the Court or the Board may be considered . . . in determining the appropriateness of any discipline, or the form of any discipline, in subsequent cases against the defendant." Supreme Court Rule 63(d)(iii). In other words, this Court must review Kennedy's entire history since that time when he became a member of this Bar in 1974 in order to determine what effect, if any, prior disciplinary measures against Kennedy have on today's ruling. Third, since the Court in its discretion can impose such disciplinary measures as it deems appropriate, it is necessary to consider any mitigating as well as aggravating circumstances going to the type and severity of the violations committed.

Turning to the violations themselves, we note that Kennedy's behavior as a member of this Bar has fallen short of its duty in the following ways.[8] First, in No. 60, Kennedy has failed to assist in maintaining the integrity and competence of the legal profession by conduct, which to say the least, was prejudicial to the effective administration of justice. Second, Kennedy by not taking reasonable steps to avoid prejudice to this client's rights upon withdrawal from employment in No. 204 and by charging excessive fees in No. 205 has failed to assist the legal profession in fulfilling its duty to make legal counsel available. Third, Kennedy in No. 204 has failed to represent his client competently by neglecting to file an affidavit of dependency as required by 13 *Del. C.* §1512(a). Fourth, and not least, Kennedy has demonstrated on multiple occasions that he does not adhere to the concept of representing a client zealously within the bounds of the law. In No. 204, Kennedy failed to seek the lawful objective of the client

8. The Court in attempting to classify Kennedy's actions finds it suitable to rely on the general concepts of the Code of Professional Responsibility set out in those Canons reflecting the Disciplinary Rules (DR's) violated, which unlike the Canons are mandatory in nature.

and, at the same time, failed to carry out his attorney/client employment contract. Also, in No. 60, he exhibited conduct which can only be described as discourteous and degrading to the tribunal.

Kennedy's failure in the matters presently before the Court to promote the concepts set forth in the select Canons of the Code of Professional Responsibility, described above, is further aggravated by the fact that this Court by Order dated July 10, 1978 publicly censured Kennedy for violation of the same concepts, violations of the same DR's, and a host of other DR's reflecting those same concepts.[9] Such being the case, this Court is highly concerned that the attitude of Kennedy, as reflected by what we deem an unheard of pattern of behavior by a member of this bar, has reached a point where drastic action must be taken regarding his fitness to practice law. In addition, the Court weighs heavily against Kennedy his contemptuous attitude in reference to an arm of this Court, namely the Board on Professional Responsibility, in his action in No. 75 regarding his lack of cooperation in the investigation into various complaints against him in that he failed to respond to subpoenas issued and interrogatories directed to him by the Board in eleven (11) proceedings charging him with misconduct.

Before turning to the imposition of the discipline, however, it is necessary in regard to No. 75 that we distinguish between the purpose of the disciplinary process and the invocation of the contempt power of the Courts which uniformily is directed to acts which threaten to obstruct justice, threaten to obstruct the carrying out of court orders, or threaten to bring a court into disrepute. Disciplinary processes, on the other hand, although they may overlap contempt sanctions to some degree, are designed to focus on the protecttion of the public from lawyers whose conduct falls below that prescribed by the Code of Professional Responsibility Standard 1.1 of the A.B.A. Standards for Lawyer

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9. See Appendix A.

Appendix A

Discipline and Disability Proceedings (February 1979), which provides:

> 1.1 Purpose of Lawyer Discipline and Disability Proceedings.
>
> The purpose of lawyer discipline and disability proceedings is to maintain appropriate standards of professional conduct in order to protect the public and the administration of justice from lawyers who have demonstrated by their conduct that they are unable or are likely to be unable to properly discharge their professional duties.
>
> COMMENTARY.
>
> . . .Disciplinary procedures are not lawsuits between parties litigant but rather are in the nature of an inquest or inquiry as to the conduct of the respondent. They are not for the purpose of punishment, but rather seek to determine the fitness of an officer of the court to continue in that capacity and to protect the courts and the public from the official ministration of persons unfit to practice. Thus the real question at issue in a disbarment proceeding is the public interest and the attorney's right to continue to practice a profession imbued with public trust. *In re Echeles*, 430 F.2d 347, 349 (7th Cir. 1970).

Thus, while some instances of Kennedy's misconduct do not involve contempt of court, e.g., excessive fee charging, it is difficult to conclude that those instances which involve contemptuous acts do not call into question the fitness of Kennedy to practice law. Therefore, we weigh them equally along with the other types regardless of the contempt sanctions (or lack thereof) already imposed.

Appendix A

IX

We now turn to the imposition of the discipline itself. Fully aware of the wide range of discipline available and finding no mitigating circumstances which affect the nature or degree of the discipline imposed, we hereby suspend John B. Kennedy for a period of two years, effective immediately. We further hold that during the period of suspension, Kennedy shall not (a) engage in any activity whatsoever as a member of the Delaware Bar; (b) share in any fees collected, billed, or earned by any other attorney for legal services rendered by such attorney; (c) resort to the use of professional stationary, even for personal correspondence; (d) maintain any telephone listing as an attorney; (e) advertise in any medium the ability to practice law; (f) maintain or occupy any office designated as a law office; and that, without limiting the foregoing, the latter restriction specifically requires Kennedy to (1) remove immediately from any premises any sign bearing his name as an attorney and (2) remove immediately from any premises maintained or occupied by him any sign indicating usage as a law office.

Furthermore, within thirty (30) days of today's date, Kennedy shall notify or cause to be notified by registered or certified mail, return receipt requested; (a) all clients being represented in pending matters; (b) any and all co-counsel in pending matters; (c) any opposing attorney in pending matters, or in the absence of such attorney, the adverse parties; (d) all persons or their agents or guardians to whom a fiduciary duty is or may be owed at any time after today's date; and (e) all other persons with whom Kennedy may at any time expect to have professional contacts under circumstances where there is a reasonable probability that they may infer that Kennedy continues as an attorney in good standing. The required notice shall advise of this Court's ruling and that Kennedy is disqualified to act as a lawyer after today's date. The notice to be given to opposing attorneys or the adverse party shall state the place of residence of Kennedy.

Appendix A

It is further ordered that within thirty (30) days, Kennedy shall deliver to all clients being represented in pending matters any papers or other property to which the client is entitled and shall notify them or any counsel representing them of a suitable time and place, calling attention to any urgency for obtaining the papers or other property. In addition, within the said thirty (30) day period, Kennedy shall refund any part of any fees paid by a client in advance which have not been earned to date.

In the event a client does not obtain another lawyer within the first twenty (20) days of the above-mentioned thirty (30) day period, it shall be the responsibility of Kennedy within the remaining ten (10) days of the thirty (30) day period to move the court or agency in which the client's matter is pending for leave to withdraw. If such is the situation, Kennedy shall file with the court or agency before which the litigation is pending a copy of the notice to opposing counsel or adverse parties.

At a time on or before the completion of the thirty (30) day period, Kennedy shall file with this Court an affidavit showing (a) his full compliance with the provisions set forth above; (b) a list of all other state, federal and administrative jurisdictions to which he is admitted to practice; and (c) his residence or other addresses to which communications thereafter may be directed.

In the event that Kennedy fails to comply with the conditions set forth regarding the thirty (30) day period or upon evidence that he has failed to continue complying with any other conditions of his suspension, this Court upon proper proof shall appoint a receiver with such powers as this Court shall direct.

At the expiration of the full two year suspension, Kennedy may apply to the Board for reinstatement. At that time, the burden is on Kennedy to demonstrate proof of rehabilitation sufficient to overcome his present inabilities to practice. Upon such proof, this Court will order reinstatement.

Appendix A

The suspension imposed today in no way affects any other matter pending before the Board, and the findings of the Board in regard to those matters shall be considered on a cumulative basis in determining any reinstatement petition along with Kennedy's compliance with today's mandates. Therefore, the Board is hereby directed to continue to investigate matters presently before it, and any others arising out of representations of Kennedy prior to today, so that they can be considered either for purposes of determining whether further sanctions are appropriate, or in the event Kennedy seeks reinstatement under the provisions set forth above upon the expiration of the two year period which commences this 24th day of January, 1984.

Appendix A

IN THE SUPREME COURT OF THE STATE OF DELAWARE

No. 98, 1976
Submitted: May 10, 1978
Decided: July 10, 1978

In Re:
JOHN B. KENNEDY, a member of the Bar of the Supreme Court of the State of Delaware

ORDER

This 10th day of July, 1978,

It Appearing to the Court:

I. That the Censor Committee of this Court has filed herein a Final Report in the above captioned matter, dated April 14, 1976, as follows:

> "The Censor Committee finds disciplinary action to be warranted upon various charges advanced and heard by the Committee in hearings held July 24, 1975, September 8, 1975, and March 3, 1976. The findings of fact and conclusions of law with respect thereto are set forth in this report by charge.
>
> "COUNT ONE
>
> "Findings of Fact:
>
> "1. One Gene Wills appeared before Alderman Joseph A. Palermo of the Town of Newport charged with a traffic violation. He was unrepresented at the time. After conducting a hearing on July 16, 1974, Alderman Palermo adjudged Gene Wills guilty of going through a red

light. He advised Mr. Wills of his right to file an appeal by posting a $500 bond. A fine of $10, plus costs, was paid by Mr. Wills on August 23, 1974.

"2. The Respondent was later consulted by Mr. Wills concerning the traffic violation. Thereafter, the Respondent addressed a letter to Alderman Palermo requesting a new trial on behalf of Mr. Wills.

"3. Under date of August 5, 1974, Alderman Palermo sent a letter to the Respondent, denying his request for a new trial.

"4. On August 6, 1974, the Respondent addressed a second letter to Alderman Palermo demanding an evidentiary hearing, and that a date for a new trial be set. On August 8, 1974, Alderman Palermo sent a second letter to the Respondent, denying his request for a new trial.

"5. On August 23, 1974, the Respondent forwarded a third letter to Alderman Palermo, rearguing his demand for a new trial and an evidentiary hearing. His letter concluded with the following language:

> " 'It is expected that you will give this your immediate and undivided attention.'

"6. Under date of September 18, 1974, the Respondent addressed a letter to John Hanna, Mayor of the Town of Newport, referring to the above traffic violation charge against Mr. Wills, and in the letter used the following language:

> " 'Mr. Palermo decided that it was not in his best interests to afford my client his

Appendix A

Constitutional right to have an evidentiary hearing as concerns this procedure step.'

"7. In his letter of September 18, 1974, the Respondent also stated that he had referred the matter to the Superior Court for adjudication, which statement in fact was untrue.

"Conclusions of Law:

"8. The Respondent has violated DR7-106(C)(6) by using language in his letter of August 23, 1974, addressed to Alderman Palermo, which was undignified and discourteous and which tended to discredit a judicial tribunal.

"9. The Respondent has violated DR8-102(B) by knowingly making a false accusation against Alderman Palermo in his letter to Mayor Hanna of the Town of Newport.

"10. The Respondent has violated DR7-102(A)(5) in that he knowingly made a false statement of fact when he stated that he had referred the matter to the Superior Court for adjudication.

"11. The Respondent has violated DR1-102(A)(5) and (6) in that he engaged in conduct that was prejudicial to the administration of justice and adversely reflected on his fitness to practice law.

"COUNT TWO

"Findings of Fact:

"1. Richard Henry Robinson had been indicted in 1974 on various charges by a federal

Grand Jury and by the Grand Jury of the State of Delaware.

"2. The ex-wife of Mr. Robinson (hereinafter 'Mrs. Robinson') had attempted to post bond on the state charges and was advised by an official in the Prothonotary's Office that a lien search would be necessary. She requested the assistance of the Respondent and he charged her and was paid the sum of $125 for performing a lien search.

"3. Thereafter, in connection with the federal charges, Mr. Robinson was sent to a federal institution in Missouri for a mental evaluation, the duration of the evaluation to be approximately sixty days.

"4. Mrs. Robinson made numerous telephone calls to the Respondent concerning the failure of Mr. Robinson to be returned to Delaware by the federal authorities after the sixty-day evaluation period had elapsed, and she retained the Respondent to accomplish the return and release of Mr. Robinson.

"5. Frances O. Robinson made a payment of $200 on July 26, 1974 to the Respondent and a further payment of $300 on September 13, 1974 for services to be rendered by him.

"6. On September 4, 1974, Mr. Robinson had personally filed a petition for a writ of habeas corpus in Missouri. The Respondent did not participate in the preparation of this petition in any manner, or consult with Mr. Robinson in connection therewith.

"7. On September 23, 1974, a United States Magistrate in Missouri filed a written opinion,

recommending that Mr. Robinson be returned to Delaware.

"8. On September 4, 1974, Judge Murray Schwartz of the United States District Court for the District of Delaware signed an order granting Mr. Robinson leave to proceed on his motion to vacate the federal indictment.

"9. On September 10, 1974, the Respondent filed a habeas corpus petition on behalf of Mr. Robinson, in the Delaware United States District Court, and apparently was unaware of the habeas corpus petition filed by Mr. Robinson previously in Missouri on September 4, 1974.

"10. The Respondent did not learn of the Missouri United States District Court order until on or about October 1, 1974.

"11. Mr. Robinson was returned to Delaware as a result of his own personal efforts and the habeas corpus petition filed by the Respondent was in no way related to his return to Delaware.

"12. No representation was actually necessary on behalf of Mr. Robinson, in light of the successful habeas corpus petition which he filed in Missouri. The Respondent could have learned of this before he proceeded in the Delaware case.

"13. On or about April 8, 1975, after Mr. and Mrs. Robinson filed their complaint with the Censor Committee in this matter, the Respondent notified Mrs. Robinson that she was indebted to him in the amount of $480 for approximately 45 telephone calls covering the period from June 30, 1974 through July 25, 1974, a period prior to the

time he submitted statements for services to Mrs. Robinson, which statements made no mention of telephone calls.

"14. The Respondent violated no disciplinary rule in charging for performance of a lien search or in performing said search.

"15. The Respondent violated DR2-106(A) and (B) in collecting a fee of $500 for filing a writ of habeas corpus for Richard Henry Robinson when, in fact, Mr. Robinson had previously filed such an action on his own behalf. The Respondent should have known, or should have attempted to learn, of the existence of all of the facts prior to filing a petition for habeas corpus in the United States District Court of Delaware.

"16. The Respondent further violated DR2-106(A) and (B) in that he made a charge for telephone calls which was clearly excessive.

"17. The Respondent violated DR1-102(A)(4) and (6) in his financial dealings with Mrs. Robinson.

"COUNT THREE

"Findings of Fact:

"1. In the case of McCoy v. Janicki and Salerno, Case No. 74-1403 (C.A. 3, 1975), the Respondent represented appellant McCoy. The appeal was from the denial of a writ of habeas corpus. By the original schedule, the Respondent was to file his opening brief on or before June 5, 1974. After one extension, and then after the United States Attorney brought the matter to the

attention of the United States Court of Appeals by motion to dismiss, the Respondent filed the opening brief on August 23, 1974. In its order of September 10, 1974, denying the motion of the appellee to dismiss, the United States Court of Appeals added the following remarks:

> " 'The foregoing Motion is denied, with great reluctance, the Court not being impressed by the insubstantial reasons offered to excuse the dereliction of appellant's counsel. Appellant's counsel is admonished that sanctions will be imposed for any future failure to comply with the rules of court.'

"Conclusions of Law:

"2. In his delay on this matter the Respondent violated DR6-101(A)(3) and DR1-102(A)(5) and (6).

"COUNT FOUR

"Findings of Fact:

"1. In the case of State of Delaware v. Isijola, Criminal Action No. 266, 1974, in the Superior Court of the State of Delaware in and for New Castle County, the Respondent represented defendant Isijola. In a letter to Mr. Isijola under date of June 17, 1974, the Respondent made improper threats to his client to extract a fee. Respondent stated in the letter that he was 'through playing games' with his client, and that if $300 in fees was not paid within three days, the Respondent would seek to withdraw 'plus have your case continued for an extended indefinite period of time.' In a subsequent letter to Mr.

Isijola, under date of July 8, 1974, he conveyed similar improper threats in an effort to collect a fee. Respondent then stated that 'your sentencing will be delayed indefinitely as a consequence of your intransigence' concerning the fee.

"Conclusions of Law:

"2. In the aforesaid conduct, the Respondent violated DR7-101(A)(2) and (3) and DR1-102(A)(4) and (6).

"COUNT FIVE

"Findings of Fact:

"1. In the case of State of Delaware v. James Heverin, Jr., Criminal Action No. 1160, 1974, in the Superior Court of the State of Delaware in and for New Castle County, the Respondent represented defendant Heverin.

"2. In a letter of October 31, 1974, to Mr. James Heverin, Sr., the Respondent made improper threats to extract a fee. The Respondent there stated that unless he was in receipt of $1,350 within five days thereafter, he would not appear at the trial of the case, then scheduled for thirteen days thereafter. The Respondent stated that 'should you decide not to acquiesce in this matter, you will be forced to seek other counsel who knows nothing of the fact situation of this case and who I feel would be unprepared to try this matter which has been scheduled one week from November 4'.

"3. In his representation in State v. Heverin, the Respondent violated his contract with Mr. Heverin, Sr., by demanding the additional sum

($1,350) when the original fee arrangement had been that he would defend the matter through trial for $1,000 and that amount had been paid.

"Conclusions of Law:

"4. In the aforesaid conduct, the Respondent violated DR7-101(A)(2) and (3) and DR1-102(A)(4) and (6).

"COUNT SIX

"Findings of Fact:

"1. In the case of State of Delaware v. Robert Glenn Johnson, Criminal Action No. 1115, 1974, in the Superior Court of the State of Delaware in and for New Castle County, the Respondent represented defendant Johnson. During the course of the trial in that case, held October 22 and 23, 1974, the Respondent continually expressed to the jury his personal belief in his client's innocence, over repeated warnings by The Honorable Bernard Balik, the presiding judge.

"Conclusions of Law:

"2. In this conduct the Respondent violated DR7-106(C)(3), (4) and (7) and DR1-102(A)(5) and (6).

"COUNT SEVEN

"Findings of Fact:

"1. On or about January 8, 1976, in the case of Robinson v. Kennedy, JP15-75-C1288, the

Respondent filed a counterclaim demanding recovery in an amount exceeding the jurisdictional limit of the Court; seeking punitive damages; and seeking injunctive relief in the nature of a commitment of the plaintiff to a mental hospital. The Respondent was aware of the limits of the jurisdiction of the court and knew that each of the prayers for relief apart from monetary damages was beyond the jurisdictional power of the Court. The counterclaims were intended to intimidate the plaintiff, his former client.

"Conclusions of Law:

"2. In the aforesaid conduct, the Respondent violated DR7-102(A)(1) and (2) and DR1-102(A)(5) and (6).

"COUNT EIGHT

"Findings of Fact:

"1. In Censor Committee Case No. 341, the Respondent received a private censure from the Censor Committee under date of December 5, 1974, for a violation of DR2-103(A) and was specifically admonished that the censure could be considered on a cumulative basis if further, future violations occurred. A further violation did later occur, to wit, the conduct set forth in Count Seven, supra, occurring on or about January 8, 1976.

"Conclusions of Law:

"2. The Respondent should be disciplined on a cumulative basis, because of a pattern of conduct in violation of DR1-102(A)(4), (5) and (6).

Appendix A

"COUNT NINE

"Findings of Fact:

"1. The Committee has found that the Respondent committed numerous disciplinary violations, set forth and itemized in the preceding eight counts.

"Conclusions of Law:

"2. By virture of the aforesaid acts, the Respondent has engaged in an overall pattern of conduct in violation of DR1-102(A)(4), (5) and (6)."

II. That the Respondent filed Exceptions to the foregoing Report of the Censor Committee, which said Exceptions were briefed and argued to this Court upon the following grounds:

"(1) The Committee failed to produce any evidence let alone clear and convincing evidence as relevant to alleged misconduct which is charged in Count VIII.

"(2) The Committee failed to prove any alleged acts of misconduct by the Respondent as reflected in its conclusions of law which appear in Count I of the April 14, 1976 Final Report.

"(3) The Committee failed to prove any alleged acts of misconduct by the Respondent as reflected in its conclusions of law which appear in Count II of the April 14 Final Report.

"(4) The Committee's 'Findings of Fact and Conclusions of Law' were rendered a nullity since it denied the Respondent the right to due process

> and a fair hearing by violating the Rules of the Supreme Court and the Rules of the Censor Committee during a hearing on March 3, 1976."

III. That upon due consideration of the Respondent's Exceptions and the briefs and arguments of counsel, there is no merit in the Respondent's Exceptions or the arguments in support thereof, and that the Censor Committee's Final Report and recommendation of disciplinary action against the Respondent should be approved;

IV. That, however, the degree of disciplinary action to be taken by this Court should be determined in the light of these facts and circumstances;

> (1) All offenses charged against the Respondent occurred in the years 1974 and 1975, the Respondent having entered the private practice of law in 1974; and
>
> (2) These proceedings have been pending in this Court for over two years, a grossly undue length of time, explainable only by the physical incapacity of the Respondent resulting from a motor vehicle accident and by an unacceptable delay in bringing this matter to issue for decision by this Court, for which all counsel in the case must bear accountability;

NOW, THEREFORE, IT IS ORDERED:

(1) That the Final Report of the Censor Committee filed herein be and it is hereby approved; and

(2) That, as sancttion for the violations of the Delaware Lawyer's Code of Professional Responsibility therein set forth, the respondent John B. Kennedy be and he hereby is PUBLICLY CENSURED; and

Appendix A

(3) That copy hereof be transmitted by the Clerk to the Chief Judge of each State Court and to the Prothonotary and Register in Chancery of each County.

BY THE COURT:

HARRY ARD
Chief Justice

APPENDIX B—ORDER OF THE SUPREME COURT OF DELAWARE DATED FEBRUARY 9, 1984

IN THE SUPREME COURT OF THE STATE OF DELAWARE

Nos. 204 and 205, 1982

Nos. 60 and 75, 1983

IN RE:
JOHN B. KENNEDY, ESQUIRE, A MEMBER OF THE BAR OF THE SUPREME COURT OF DELAWARE,

Respondent

Submitted: February 1, 1984
Decided: February 9, 1984

Before HERRMANN, Chief Justice, McNEILLY, HORSEY and MOORE, Justices.*

This 9th day of February, 1984, the Court having considered respondent John B. Kennedy's Motion for Reargument filed pursuant to Supreme Court Rule 18, Motion for Rehearing en Banc filed pursuant to Supreme Court Rule 4, and Request for Stay of Imposed Discipline filed pursuant to Supreme Court Rule 32, and having concluded that the same are without merit,

NOW, THEREFORE, IT IS ORDERED that the Motion for Reargument, the Motion for Rehearing by the Court en Banc, and the Request for Stay of Imposed Discipline be and they hereby are DENIED.

BY THE COURT:

John J. McNeilly
Justice

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* The named members of the Court constitute the qualified and available members of the Court, Justice Andrew D. Christie being disqualified.

APPENDIX C—RELEVANT RULES AND REGULATIONS

RULES OF THE CENSOR COMMITTEE OF THE SUPREME COURT OF DELAWARE

As amended to December 31, 1970.

Rule
1. Secretary of the Committee.
2. Quorum.
3. Complaints.
4. Investigations Sua Sponte.
5. Preliminary Investigations.
6. Formulation and Presentation of Charges.
7. Hearings.
8. Interrogatories.
9. Witnesses and Evidence.
10. Testimony of Out-of-State Witnesses.
11. Rights of Respondent.
12. Service of Papers.
13. Subpoenas.
14. Reports.
15. Confidential Nature of Records.
16. Mental Disability in Absence of Misconduct.
17. Mental Disability after Misconduct Charged.
18. Mental Irresponsibility as Defense to Misconduct.
19. Right to Counsel.
20. General Mental Health Procedures.

RULE 1. SECRETARY OF THE COMMITTEE

The Chairman of the Committee shall designate one of its members as the Secretary of the Committee who shall keep records of all proceedings, including a record of the receipt and disposition of all complaints and investigations as required by Supreme Court Rule 32(2)(a) and (b). The records of the Committee shall be submitted to the Supreme Court at any time upon request of the Court or a Justice thereof.
(As amended, effective May 18, 1962.)

Appendix C

RULE 2. QUORUM

Four members of the Committee shall constitute a quorum to conduct hearings and transact other business of the Committee.

RULE 3. COMPLAINTS

All complaints against members of the Bar shall be in writing, shall set out with particularity the essential facts constituting the matter complained of, and shall be filed initially with the Chairman of the Committee. In the event a complaint is made orally to any member of the Committee, it shall be the duty of such member, or some other member of the Committee to be designated by the Chairman for the purpose, to assist the complaining party or party acting on his behalf (hereinafter called the complainant) to put such complaint in writing. The member so assisting the complainant thereafter shall take no part in the deliberations or decisions of the Committee with respect to such complaint, but such member shall not be disqualified from being appointed a member of the subcommittee to make a preliminary investigation of the complaint in accordance with Rule 5 nor shall such member be disqualified from being appointed to formulate an order to show cause, to examine witnesses and present evidence of the charge before the Committee as provided in Rule 6.
(As amended, effective May 18, 1962.)

RULE 4. INVESTIGATIONS SUA SPONTE

In the event any matter involving the apparent misconduct of any attorney comes to the attention of a Committee member, the Chairman may have the matter investigated in the same manner as hereinafter provided for the investigation of complaints.
(As amended, effective May 18, 1962.)

Rule
5. Preliminary Investigations.
6. Hearings.
7. Witnesses and Evidence.

Appendix C

RULE 5. PRELIMINARY INVESTIGATIONS

The Chairman may refer each complaint or investigation sua sponte to a subcommittee consisting of one or more members of the Committee for preliminary investigation. The subcommittee shall investigate such complaint or other matter referred as fully as need be to determine the essential facts of the matter prima facie, and shall submit a report thereof to the Committee with appropriate recommendations as to the disposition of the matter. The subcommittee may require the attendance of witnesses and production of documents by subpoenas and interrogatories directed to the lawyer being investigated or other witness. The person to whom the subpoena or interrogatories are directed may, at any time prior to the time stated therein for appearance, production or answer, apply to the full Censor Committee for a protective order, and the Censor Committee, for good cause shown, may quash or modify the subpoena or grant protective relief from the interrogatories. Upon receiving the subcommittee's report, the Committee shall take such action in respect thereto as the facts and circumstances warrant. No member of the investigating subcommittee shall take part in the deliberations or decision of the Committee with respect to such matter, but members of the investigating subcommittee shall not be disqualified from being appointed to formulate an order to show cause, to examine witnesses and present evidence of the charge before the Committee as provided in Rule 6.

Whenever in the course of investigation the subcommittee ascertains that there is in process civil litigation to which the attorney under investigation is a party, or a criminal action in which such attorney is, or becomes, a defendant, either of which involves the subject matter of the investigation, the subcommittee may recommend, and the Committee may determine, that the matter be stayed for a period not to exceed 90 days, and upon such terms as the Committee may deem desirable because of pending litigation. Upon the entry of any stay, the Committee shall advise the Supreme Court of the reason why the stay was ordered. Upon application or upon the Committee's own motion,

any stay so granted which has expired or is about to expire, may be renewed from time to time for periods not to exceed 90 days. The Committee may, upon application or its own motion, at any time, revoke or modify such stay. In determining whether and upon what terms a stay should be granted, denied, revoked or extended the Committee shall consider all relevant factors, including the following: (1) The need for disposing of it at the earliest practicable time; (2) the extent to which the issues in the pending litigation are the same or substantially the same as those before it; (3) the extent to which the matter under investigation would probably be delayed by awaiting the disposition of the pending civil litigation or criminal action; (4) the extent to which the matter under investigation would probably be expedited by awaiting the plea or judgment in the criminal action; (5) the extent to which the matter under investigation would be aided, as to the determination of a material issue, by awaiting evidence to be adduced in the pending litigation; (6) the extent to which evidence may be unavailable to the investigation because of any delay occasioned by withholding further action; (7) the extent to which witnesses or documents may be unavailable to the investigation because of concurrent discovery or trial proceedings in the pending litigation; (8) the extent to which the attorney under investigation or another party to the pending litigation may be prejudiced in the pending litigation by withholding or failing to withhold further action. The Committee shall render regular reports to the Supreme Court of the status of all matters which have been stayed.
(As amended, effective Dec. 10, 1974, Mar. 28, 1979.)

Effect of amendment. — The 1979 amendment, effective Mar. 28, 1979, added the second paragraph.

RULE 6. FORUMULATION AND PRESENTATION OF CHARGES

In the event the Committee decides to hold a hearing in respect to any complaint or other matter brought to its attention, the Chairman of the Committee shall appoint one of its members

to formulate an order to show cause against the attorney and to examine the witnesses and present all evidence in support of the charges before the Committee. Such member so appointed shall take no other part in the deliberations or decision of the Committee in respect to such matter.

The Order to Show Cause shall be signed by the Committee member so appointed, shall be served upon the respondent at least 20 days prior to the time fixed therein for his appearance before the Committee, and shall be in substantially the following form:

CENSOR COMMITTEE
of the
SUPREME COURT OF DELAWARE

In the Matter of a Member of the Bar of the Supreme Court of Delaware

ORDER TO SHOW CAUSE
No. _____

To_____, Respondent:

You are hereby directed to appear before the Censor Committee of the Supreme Court of Delaware at _____in_____, _____County, on the _____ day, of _____, 19____, at the hour of _____o'clock, _____M., Eastern Standard Time, then and there to show cause if any there be why you should not be disciplined for misconduct by reason of the following:

(Here set forth the formal charges or incorporate by reference the written charges attaching the same to this order.)

This order is issued and served pursuant to the Rules of the Censor Committee of the Supreme Court of Delaware and the Rules of the Supreme Court of Delaware.

Appendix C

Dated this _____day of_____, 19____.

_____
Committee Member, whose address is
_____
_____,
Delaware

RULE 7. HEARINGS

(e) Stay of Hearing. Upon application by the subcommittee which conducted the preliminary investigation, by the respondent, or by the Committee on its own motion, the Committee may determine that the matter be stayed for a period not to exceed 90 days, and upon such terms as the Committee may deem desirable because of pending litigation. Upon the entry of any stay, the Committee shall advise the Supreme Court of the reason, why the stay was ordered. Upon application or upon the Committee's own motion, any stay so granted which has expired, or is about to expire, may be renewed from time to time for periods not to exceed 90 days. The Committee may, upon application by the subcommittee which conducted the preliminary investigation, the respondent, or by the Committee on its own motion, at any time, revoke or modify such stay. In determining whether and upon what terms a stay should be granted, denied or revoked, the Committee shall consider all relevant factors including all those listed in Rule 5 of the Censor Committee Rules relating to stay of preliminary investigation, and shall also consider the risk that the integrity of justice may be lowered if a failure to await the outcome of related litigation brings about a result inconsistent with the pending litigation.
(Amended, effective Mar. 28, 1979.)

Effect of amendment. — The 1979 amendment, effective Mar. 28, 1979, added paragraph (e).

As the rest of the rule was not affected by the amendment, it is not set out in this Supplement.

Appendix C

RULE 8. INTERROGATORIES

The Committee may require any member of the Bar to answer written interrogatories propounded by it relevant to any matter which is the subject of an investigation or a preliminary or formal hearing.

RULE 9. WITNESSES AND EVIDENCE

All witnesses shall be sworn in all proceedings hereunder. The rules of evidence applicable to the Superior Court of the State of Delaware shall be followed as far as practicable, provided that evidence may be admitted and considered which possesses probative value commonly accepted by reasonably prudent men in the conduct of their affairs.

Where the respondent is or has been a party to a proceeding, whether criminal, civil, administrative or otherwise, the relevant portions of the transcript of the proceedings, exhibits, findings of fact, conclusions of law, opinions, decisions and judgments, shall be admitted in evidence, and shall be accorded such weight as the Committee shall deem appropriate; provided however that proof of a conviction of the respondent for any crime shall be conclusive evidence of the commission of that crime. (Amended, effective Mar. 28, 1979.)

Effect of amendment. — The 1979 amendment, effective Mar. 28, 1979, added the second paragraph.

RULE 10. TESTIMONY OF OUT-OF-STATE WITNESSES

In the event that either the complainant or the respondent desires to take the testimony of a witness residing out of the State by deposition or otherwise, application may be made to the Supreme Court for an appropriate order in accordance with the provisions of Rule 32(2)(c) of the Supreme Court.

Appendix C

RULE 11. RIGHTS OF RESPONDENT

Any person complained against shall have the right to defend against the charge by the introduction of evidence and the right to be represented by counsel and to examine and cross-examine witnesses. He shall also have the right to the issuance of subpoenas for the attendance of witnesses to appear and testify or for the production of books and records.

RULE 12. SERVICE OF PAPERS

Unless otherwise provided, papers shall be served in the following manner:

Orders to Show Cause, Draft Reports and Final Reports as required by the provisions of Supreme Court Rule 32(2)(a) upon the respondent either personally or by registered or certified mail.

Subpoenas by delivering a copy personally to the person addressed therein or mailing a copy to such person by certified or registered mail.

Answers to Orders to Show Cause and to written Interrogatories by delivering the original and 2 copies thereof to the Committee member signing such Order or Interrogatories at his office address.

In all cases where delivery of papers is made by certified or registered mail a return receipt will be requested and kept with the records of the case.

(As amended, effective May 18, 1962.)

RULE 13. SUBPOENAS

Subpoenas for the attendance of witnesses and the production of books and records shall be in substantially the following form:

Appendix C

CENSOR COMMITTEE
of the
SUPREME COURT OF DELAWARE

In the Matter of a Member
of the Bar of the Supreme
Court of Delaware

SUBPOENA
NO._____

To_____
(Name of Witness)

You are hereby directed to appear and attend before the Censor Committee of the Supreme Court of Delaware at _____in_____, _____County, on the _____day of _____, 19___, at the hour of _____o'clock, _____M., Eastern Standard Time, then and there to testify in the above entitled matter.

(If the production of books, etc., is desired, add "and to bring with you the following"; and describe the same.)

For failure to appear and attend as herein required you may be deemed to be in contempt of the Supreme Court of Delaware.

Dated this _____day of _____, 19_____.

_____
Committee Member, whose
address is
_____
_____, Delaware

The subpoena may, in the alternative, require the person to whom it is directed to make written answer to written interrogatories to be attached thereto. The answer shall be in

writing made under oath, signed by the witness, and filed within the time and at the place therein set forth. The form of such subpoena shall be substantially as follows:

CENSOR COMMITTEE
of the
SUPREME COURT OF DELAWARE

In the Matter of a Member
of the Bar of the Supreme
Court of Delaware

SUBPOENA
NO._____

To: _____
(Name of Witness)

You are hereby directed to make written answers under oath signed by you to the written interrogatories attached hereto and to file such answer with the Censor Committee of the Supreme Court of Delaware at _____ in _____County, on or before the _____day of _____, 19_____.

For failure so to answer said written interrogatories as herein required you may be deemed to be in contempt of the Supreme Court of Delaware.

Dated this _____day of _____, 19_____.

_____
Committe Member, whose address is
_____
_____, Delaware.

RULE 14. REPORTS

The Chairman shall designate a member of the Committee to write the draft report recommending disciplinary action which

report shall contain the findings of fact and conclusions of law as required by Supreme Court Rule 32(b). Such report shall be submitted to all members of the Committee taking part in the hearing, and upon the approval by a majority of those taking part shall become the draft report of the Committee. The procedure upon the filing of the draft report shall be as set out in Supreme Court Rule 32(2)(a). At the time of the filing of the final report as provided in said Rule, any member of the Committee may file a minority report if he so desires. In the event any matter has been referred to the Committee for investigation by any judge of any court of this State, a report of the result of such investigation shall be made to the referring judge, notwithstanding the fact that no report recommending disciplinary action is filed with the Clerk of the Supreme Court.

RULE 15. CONFIDENTIAL NATURE OF RECORDS

All records and proceedings of the Committee shall be confidential, and no information with respect thereto shall be disclosed by the Committee, its members, stenographer or agent, except as contemplated by Rule 32 of the Rules of the Supreme Court, and except, upon receipt by the Chairman or Secretary of the Committee of a bona fide inquiry by a governmental agency or a bar examining, admissions, grievance or censor committee of another jurisdiction investigating the character of a member of the Delaware Bar, the Chairman or Secretary may disclose the existence or nonexistence of such records or proceedings or the contents thereof and the disposition of the same.
(As amended, effective Sept. 25, 1961.)

RULE 16. MENTAL DISABILITY IN ABSENCE OF MISCONDUCT

An attorney who has been adjudged insane, mentally ill, mentally incompetent, of unsound mind, or addicted to intoxicants or drugs, or, who, after hearing is found by the Censor Committee to be insane, mentally ill, mentally incompetent, of unsound mind or addicted to intoxicants or drugs to such an extent as to endanger

the interests of his clients or the public, shall upon recommendation of the Censor Committee be suspended by the Supreme Court from the practice of law until further order of that Court. No attorney so suspended shall be reinstated until he has satisfied the Supreme Court by clear and convincing evidence that he is completely cured of such insanity, mental illness, mental incapacity or such addiction.
(Added, effective May 18, 1962.)

RULE 17. MENTAL DISABILITY AFTER MISCONDUCT CHARGED

If after charges of misconduct have been filed against an attorney, the Censor Committee has reason to believe and after a hearing before the Censor Committee finds that the respondent attorney is of unsound mind, mentally ill, mentally incompetent, insane or addicted to intoxicants or drugs to such an extent that, in the judgment of the Censor Committee, he is incapable of conducting a proper defense to the formal charges against him, the Censor Committee shall recommend to the Supreme Court that the attorney be suspended from the practice of law and if the Supreme Court orders his suspension, it shall also direct that all further proceedings on the formal complaint be held in abeyance until it shall appear to the Censor Committee, upon application made by the respondent attorney, that he is mentally capable of conducting a proper defense to the formal complaint in question. Thereafter, a hearing on the formal complaint shall be had as provided by these Rules. If the Censor Committee concludes that the charges in the formal complaint have not been sustained, or having been sustained do not warrant suspension or disbarment, then respondent attorney shall be restored to membership in the Bar if and when he has satisfied the Supreme Court by clear and convincing evidence that he has been so completely cured of such insanity, mental illness, mental incapacity or addiction that there is little or no likelihood of a recurrence of the condition.
(Added, effective May 18, 1962.)

Appendix C

RULE 18. MENTAL IRRESPONSIBILITY AS DEFENSE TO MISCONDUCT

(a) Mental irresponsibility is a complete defense to conduct of an attorney which would otherwise warrant disciplinary action: (1) If such conduct was the result or consequence of mental incompetency and (2) if the mental condition which was responsible for such conduct has been cured so completely that there is little or no likelihood of a recurrence of the condition. The burden of proof of this defense, in all its aspects, is upon the respondent attorney.

(b) If the respondent attorney is able to sustain the burden of proof as to his mental irresponsibility at the time of the conduct of which complaint is made, but is unable to prove recovery to the extent indicated in Rule 18(a) and the Censor Committee has reason to believe that such recovery is possible, the Committee will recommend to the Supreme Court that respondent be suspended until such time as he can prove such recovery, otherwise the Committee shall recommend his disbarment to the Supreme Court.
(Added, effective May 18, 1962.)

RULE 19. RIGHT TO COUNSEL

In all proceedings under Rules 16, 17 and 18, the respondent attorney must be represented by counsel. If the respondent attorney is not represented by counsel of his own choosing, the Supreme Court will appoint counsel to act for and on his behalf.
(Added, effective May 18, 1962.)

RULE 20. GENERAL MENTAL HEALTH PROCEDURES

(a) If the conduct complained of, if proven, will warrant disciplinary action, and if there is no reason to believe that such conduct was the result or consequence of mental illness or defect, mental incompetency, or insanity, but there is reason to believe that respondent attorney is at present of unsound mind, mentally

ill, mentally incompetent or insane, the Censor Committee shall proceed in accordance with Rule 17 hereof.

(b) If the conduct complained of, if proven will warrant disciplinary action, and there is reason to believe that such conduct was or may have been the result or consequence of mental illness or defect, mental incompetency or insanity resulting in mental irresponsibility and there is reason to believe that the attorney is at present of unsound mind, mentally ill, mentally incompetent or insane, the Censor Committee shall proceed in accordance with the first sentence of Rule 17. When the Censor Committee concludes, under Rule 17, that respondent attorney is mentally capable of conducting a proper defense to the formal complaint against him, the Censor Committee shall then proceed in accordance with Rule 18(a) and (b).

(c) If the conduct complained of, if proven, will warrant disciplinary action, and there is reason to believe that such conduct was, or may have been the result or consequence of mental illness or defect, mental incompetency or insanity, resulting in mental irresponsibility, but there is no reason to believe that respondent attorney is at present of unsound mind to such an extent as to render him incapable of conducting his own defense, the Censor Committee shall proceed in accordance with Rule 18(a) and (b). (Added, effective May 18, 1962.)

Supreme Court, U.S.
FILED
APR 30 1984
ALEXANDER L. STEVAS
CLERK

No. 83-1606

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

JOHN B. KENNEDY,
Petitioner

v.

THE BOARD ON PROFESSIONAL RESPONSIBILITY OF THE SUPREME COURT OF DELAWARE AND THE SUPREME COURT OF DELAWARE,
Respondents

On Petition for a Writ of Certiorari to the Supreme Court of the State of Delaware

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED FOR REVIEW

1. Is it a denial of due process to a respondent in a lawyer disciplinary proceeding if a Board member sitting as an adjudicator in his case is also assigned to investigate and present evidence in another completely unrelated case against the same respondent during the same time period?

2. If the Rules relating to discovery before the Board on Professional Responsibility do not accord precisely the same discovery procedures to the respondent as to the investigating attorney, does this necessarily constitute a denial of due process in this case?

3. When a responding attorney before the Board on Professional Responsibility defies the Board and refuses to answer pending discovery, and is notified, as a result, to appear for a hearing on contempt, is it a denial of due process for the Board subsequently to recommend discipline based on that contempt?

4. When an attorney, more than one month after being notified of the date for a disciplinary hearing in his case, applies for a continuance on the grounds that after receiving such notification his counsel undertook another engagement, is it a denial of due proess to refuse that continuance when that responding attorney has ample time to retain alternative counsel the case being one not involving complex issues of fact or law?

5. In an attorney discipline proceeding is it a denial of the right to due process not to provide a separate hearing, in addition to the hearings already held before the Board on Professional Responsibility and the Delaware Supreme Court, for the presentation of evidence and/or argument on the nature of the discipline to be imposed, where such a separate hearing is not requested in the proceedings below?

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Table of Contents	ii
Table of Authorities	iii
Statement of the Case	1
Summary of Argument	4
Argument	6
Introduction	6
I. It is not a denial of due process for a board member to act as an adjudicator in one proceeding and to investigate or present evidence in a separate unrelated proceeding involving the same attorney	7
II. The discovery provisions of the Rules are not unconstitutional	14
III. The Petitioner was clearly notified of the contempt proceeding, and it was on a finding of contempt that the Board urged he be disciplined	15
IV. The Board's exercise of its discretion in denying Petitioner's request for a continuance did not deny Petitioner his right to counsel, his right to confront witnesses or his right to a fair trial	16
V. Petitioner had adequate opportunity to present evidence as to the nature of the discipline to be imposed, and Petitioner neither sought nor was entitled to an additional separate hearing for this purpose	19
Conclusion	20

TABLE OF AUTHORITIES

Cases	Page
Bar Ass'n of Baltimore City v. Cockrell, 270 Md. 686, 313 A.2d 816 (1974)	17
Blackledge v. Commonwealth, 62 Pa. Commw. 188, 435 A.2d 309 (1981)	17
Doraiswamy v. Secretary of Labor, 555 F.2d 832 (D.C. Cir. 1976)	9
FTC v. Cement Institute, 333 U.S. 683 (1948)	8
Hodge v. Hodge, 507 F.2d 87 (3d Cir. 1975)	17
In re Murchison, 349 U.S. 133 (1955)	12
In re Oxman, 496 Pa. 534, 437 A.2d 1169 (1981), *cert. denied*, 456 U.S. 975 (1982)	6, 11, 15
In re Ruffalo, 390 U.S. 544 (1968)	6
In re Smith, 75 Ill.2d 20, 387 N.E.2d 316, 25 Ill. Dec. 660, *cert. denied*, 444 U.S. 841 (1979)	19
In re Weinstein, 254 Or. 392, 459 P.2d 548 (1969), *cert. denied*, 398 U.S. 903 (1970)	6
Javits v. Stevens, 382 F. Supp. 131 (S.D.N.Y. 1974)	16
Martin v. State, 433 A.2d 1025 (Del. 1981)	17
Martin-Trigona v. Underwood, 529 F.2d 33 (7th Cir. 1975)	11
Matter of Duncan, 541 S.W.2d 564 (Mo. 1976)	13
Morris v. Slappy, ____ U.S. ____, 103 S. Ct. 1610 (1983)	17
NLRB v. Donnelly Garment Co., 330 U.S. 219 (1947)	8
Noah v. United States, 316 F.2d 159, 160 (9th Cir.), *cert. denied* 375 U.S. 855 (1963)	11

TABLE OF AUTHORITIES—(*Continued*)

Cases: Page

Raymond Heartless, Inc. v. State, 401 A.2d 921 (Del. 1979) 17

Schweiker v. McClure, 456 U.S. 188 (1982) 9, 11

Tumey v. Ohio, 273 U.S. 510 (1927) 12

Ungar v. Sarafite, 376 U.S. 575 (1964) 17, 18

United States v. Perlstein, 126 F.2d 789 (3d Cir.), *cert. denied*, 316 U.S. 678 (1942) 11

United States v. United Mine Workers of America, 330 U.S. 258 (1944) 15

Wardius v. Oregon, 412 U.S. 470 (1973) 15

Withrow v. Larkin, 421 U.S. 35 (1975) 8, 11, 12

Statutes and Other Authorities

8 U.S.C. §1182 10

13 *Del.C.* §1512 2

Board on Professional Responsibility Rule 5 .....7, 9, 13, 14

Board on Professional Responsibility Rule 10 14

Board on Professional Responsibility Rule 11 14

3 K. Davis, *Adminstrative Law Treatise* §18:2 (2d ed. 1980) 13

No. 83-1606

IN THE
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October Term, 1983

JOHN B. KENNEDY,
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v.

THE BOARD ON PROFESSIONAL RESPONSIBILITY OF THE SUPREME COURT OF DELAWARE AND THE SUPREME COURT OF DELAWARE,
Respondents

On Petition for a Writ of Certiorari to the Supreme Court of the State of Delaware

BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

Statement of the Nature and Stage of the Proceeding

This is a petition for a writ of certiorari to review an Opinion and Order of the Supreme Court of Delaware dated January 24, 1984 suspending the petitioner from the practice of law for two years, and to review the subsequent order of that Court of February 9, 1984, denying

a motion for reargument, a motion for hearing en banc, and a request for stay of discipline.

This is the answering brief of the Board on Professional Responsibility of the Supreme Court of Delaware and of the Supreme Court of Delaware. While the Supreme Court of Delaware itself is named as a nominal respondent, the petition does not define what, if any, role it should play in that capacity, although of course any writ of certiorari which issues would be directed to the Supreme Court of Delaware.

Statement of Facts

It is important to recognize that in this case the Delaware Supreme Court was dealing with four separate and distinct cases involving petitioner John B. Kennedy (hereinafter "petitioner"). This fact is obscured by the apparent series of typographical errors in the reprinting of the opinion, since the headings of the separate cases are omitted in the appendix to the petition as indicated below. Very briefly summarized, these cases are as follows:

1. Everett — No. 204, 1982. In this case petitioner was charged with failure to file a routine affidavit of dependency in Family Court litigation, as required by 13 *Del. C.* §1512(b), and with filing a deficient affidavit for counsel fees, followed by a failure by petitioner to take any steps to cure the deficiencies after opposing counsel and the Court called it to his attention. The case further involves the failure of petitioner to file a motion for reargument to notify his client of the situation, or to tell her that the effect might be to destroy her rights to support, petitioner's refusal to file a protective appeal at the request of his client (petitioner demanded payment in advance before taking any such step), together with petitioner's refusal to give the file on the case to another attorney (who had been asked by the cli-

ent to rectify the situation) unless petitioner was paid in advance, coupled with petitioner's refusal to submit a statement for the fees which he claimed to be due. Finally, the case included reference to petitioner's refusal to release the file until payment was made for photocopying, and until the client gave him a general release.

2. Book — No. 205, 1982. At page 5a[1] of the Petition's Appendix a line has been omitted which should appear above the title "FINDINGS OF FACT" reading: "As to representation of Robert A. Book (No. 205, 1982)." (The line has been tacked on the end of the previous paragraph.) This case involved petitioner's entering into a 40% contingent fee contract for the collection of Workmen's Compensation relief, followed by petitioner's charging his client, in fact, a 50% fee although the relief for the client was being paid without any contest or dispute, and without the need to file suit (although a petition with the Industrial Accident Board was, in fact, filed). Petitioner's involvement had no impact whatsoever on the payment. Further, petitioner imposed additional charges even over and above the 50% fee, including charges for office visits.

3. Tingle — No. 60, 1983. At page 11a, there is an introductory line omitted which should appear above the words "COUNT I" reading: "As to representation of Clara Tingle (No. 60, 1983)." (This line has been tacked on the end of the previous paragraph.) This case involved petitioner's rude and offensive conduct towards the witnesses, the prosecuting officer and the judge during a trial, including harassing of petitioner's own client on the witness stand to the extent that she "broke down"

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1. References to the Appendix to the Petition are designated with the page number and a lower case "a": "5a".

and was driven to the "verge of hysteria." See page 11a. Thereafter, petitioner tried to persuade his client to sign an affidavit swearing "that she was happy with his services." See page 12a.

4. Failure to respond to subpoenas of the Board — No. 75, 1983. This case related to procedures before the Board in 11 cases other than the cases discussed above. Petitioner was disciplined based on the finding of the contempt of the Board.

As noted below, certain of the issues arise only in one or more of these cases, but not in all. As we understand it (though this is not clear to us from the Petition), petitioner's Point I (commingling of functions) relates only to Case 204; Point II (invalidity of the discovery rules) relates only to Case 75; Point III (notice of contempt charge) relates also only to Case 75; Point IV (denial of a request for a continuance) relates only to Case 60; while Point V (absence of an additional, separate hearing on the nature of the discipline to be imposed) relates to all four cases, Nos. 205, 204, 75 and 60.

SUMMARY OF ARGUMENT

1. This Petition does not involve a situation where the same person served as prosecutor and judge in the same case. Here, while two Board members who sat at the hearing in Case 204 later served in two unrelated cases (60 and 205), they were acting in No. 60 and No. 205 not as prosecutors but solely for the purpose of investigating and presenting evidence. Further, even when there has been a commingling of functions in an agency such as this, this Court has held that there is no denial of due process when there is no evidence to overcome the presumption of honesty and integrity in those serving as adjudicators.

2. Petitioner had adequate means for developing

the evidence on his side of the case, and therefore the difference between the discovery rights given to the Board and those given to petitioner did not result in a deprivation of petitioner's right to due process.

3. While the hearing before the Board was directed to finding petitioner in contempt, the Board was perfectly within its rights in also recommending subsequently that the contempt be considered by the Delaware Supreme Court as a basis for discipline.

4. There was no abuse in the Board's exercise of its discretion in denying petitioner's attorney's application for a continuance of the hearing in Case No. 60 when that attorney never even requested a continuance until one month after he had received notice of the hearing, and the basis of the request was that the attorney desired to attend a matter which had been scheduled after he knew of the Board hearing date. There was no denial of right to counsel, a right to confront witnesses, or a right to a fair trial in such circumstance, particularly since petitioner had more than adequate opportunity to obtain substitute counsel and petitioner willfully left the hearing in defiance of a subpoena compelling his presence.

5. Petitioner's belated complaint that he is entitled to an entirely separate and additional hearing, after a finding that discipline is warranted, to present evidence and argue about the type of discipline which is to be imposed, is without merit, particularly since petitioner had more than adequate opportunity to make such arguments both before the Board and before the Supreme Court of Delaware in connection with his discussion of the case generally.

ARGUMENT

Introduction

The petitioner in this case has, regrettably, largely ignored the Opinion of the Supreme Court of Delaware in presenting his contentions to this Court. As a result, findings and conclusions by the Delaware Supreme Court, and authorities cited by it, go largely undiscussed and unrebutted. The Delaware Supreme Court Opinion itself thus provides a largely unchallenged answer to petitioner's contentions. Therefore, in discussing those contentions here we will be, in large part, furnishing answers which the Delaware Supreme Court had already furnished before the petition was filed.

Petitioner relies throughout his petition on an observation from this Court's opinion in *In re Ruffalo*, 390 U.S. 544 (1968), to the effect that disciplinary proceedings are "quasi-criminal" in nature. That may be true, but where does it lead? Even if disciplinary proceedings are "quasi-criminal" it is perfectly clear that that does not mean all the elements of criminal procedure and law are incorporated into them. *In re Oxman*, 496 Pa. 534, 540, 437 A.2d 1169, 1172 (1981), *cert. denied*, 456 U.S. 975 (1982) ("It is now well-established that not all constitutional protections afforded defendants in criminal cases apply to disciplinary proceedings.") Thus it is simply a *non sequitur* to assert that because a given rule is applicable to a criminal proceeding it is therefore applicable to a discipline proceeding which is of a quite different nature, where the principal objective is to protect the public, and punishment of an offending member of the bar is merely incidental. *In re Weinstein*, 254 Or. 392, 394, 459 P.2d 548, 549 (1969), *cert. denied*, 398 U.S. 903 (1970).

I. IT IS NOT A DENIAL OF DUE PROCESS FOR A BOARD MEMBER TO ACT AS AN ADJUDICATOR IN ONE PROCEEDING AND TO INVESTIGATE OR PRESENT EVIDENCE IN A SEPARATE, UNRELATED PROCEEDING INVOLVING THE SAME ATTORNEY.

The Delaware Board on Professional Responsibility, an arm or agency of the Superme Court of Delaware, is made up of unpaid attorneys designated by the Delaware Supreme Court to serve in this capacity. The procedures of the Delaware Board on Professional Responsibility contemplate that when a complaint is brought to the attention of the Board it will initially be assigned to an attorney who is a member or associate member of the Board for investigation. That attorney, who thereafter may take no part in the actual adjudicatory functions of the Board in that case (See Rule 5, page 53a) completes an investigation, then reports to the Board so it can determine whether there is probable cause necessitating a hearing. Rule 5, page 53a.

In this particular series of cases involving a high volume of complaints against a single member of the Bar, in order to divide up the work of investigating and presenting evidence among the members of the Board, it became necessary to assign those cases to various different Board members. As a result, as the petition alleges, F. Alton Tybout did sit in the hearing on case No. 204 on May 12, 1981, and did later, namely in the following year, present evidence against petitioner in the hearing on the unrelated case No. 205 on April 15, 1982. Similarly, O. Francis Biondi sat in the hearing on case No. 204 on May 12, 1981, and was, a year later, involved in presenting the evidence on the unrelated case No. 60 in April and May of 1982 when the hearings on those cases were scheduled. Only case 204 is involved in this aspect of the Petition, as we understand it. Petitioner does not charge (and did not charge in the court below)

that in cases 60, 205 and 75 there was any member of the panel who was also an investigator.

Petitioner also appears to complain at P-6[2] of the "ex parte review by the entire Board without participation or even presence of the petitioner." That review, however, was confined to a consideration of whether or not a rule to show cause should issue. Even in criminal proceedings, where stricter rules pertain, the accused does not normally participate in grand jury proceedings or deliberations in the District Attorney's office relating to the initiation of a prosecution. Petitioner offers no authority as to why a different rule should pertain here. Instead, petitioner seems to suggest that the members of the Board are "tainted" by having participated in such a proceeding, and later sitting in review at the actual hearing of the charges. Petitioner offers no reason why the "taint" exists in this case, and would not exist when a judge presides over the empaneling of a grand jury, or over proceedings relating to the suppression of evidence, or motions to dismiss, and later presides at a trial. This Court has previously considered and rejected just such a contention in *FTC v. Cement Institute*, 333 U.S. 683 (1948). "[T]he fact that the commission had entertained such views as the result of its prior *ex parte* investigations did not necessarily mean that the minds of its members were irrevocably closed on the subject of respondents' basing point practices." *Id.* at 701. *See also NLRB v. Donnelly Garment Co.*, 330 U.S. 219, 236-237 (1947); *Withrow v. Larkin*, 421 U.S. 35, 55-57 (1975).

Further, the fact that after all of the proceedings were concluded before the Board of Professional Responsibility, and the matter was then presented to the Delaware Supreme Court, Mr. Biondi acted as the representative of the Board on Professional Responsibility to present the matter to the Supreme Court does not, in some sort of retroactive way "taint" the impartiality of

2. References to pages in the Petition are: "P-6".

Mr. Biondi when he had previously sat as a member of the Board on Professional Responsibility. His role in the Delaware Supreme Court was not that of prosecutor, but as Board representative and attorney presenting the case for decision.

As the Delaware Supreme Court points out (p. 18a), the petitioner conceded that the Board Rules contain strict safeguards preventing commingling of the three functions — investigative, prosecutorial, and adjudicative — in the same case, and these Rules were followed in each case involving the petitioner. See also Rule 5 at p. 53a. Thus petitioner's complaint is confined to the situation where Messrs. Biondi and Tybout, who sat on the panel adjudicating case No. 204 on May 1981, also subsequently investigated and presented evidence in entirely different cases against this petitioner (205 and 60) in April and May of 1982 before the issuance of the draft report on 204 on June 17, 1982.

This contention was analyzed by the Delaware Supreme Court, and rejected on the basis of the doctrine in *Withrow v. Larkin*. In that case, as the quotation by petitioner at P-9-10 indicates, this Court noted that such a contention (there in the context of a physician's objecting, in a proceeding to revoke his license, that the same members both investigated and adjudicated the case) has a "difficult burden of persuasion to carry." 421 U.S. at 47. No evidence was presented by Kennedy to overcome what this Court characterized as "a presumption of honesty and integrity in those serving as adjudicators." *Id. See also Schweiker v. McClure*, 456 U.S. 188, 196 (1982) ("The burden of establishing a disqualifying interest rests on the party making the assertion."); *Doraiswamy v. Secretary of Labor*, 555 F.2d 832 (D.C. Cir. 1976).

In the latter case, *Doraiswamy*, the United States Court of Appeals for the District of Columbia Circuit considered and rejected an argument almost indentical

to that now made by petitioner. There the appellant, an alien, contended that he was denied an impartial adjudicator in connection with the Department of Labor's denial of his application for certification which would permit him to obtain a job in the United States.[3] The appellant applied for certification on three separate occasions, at each time attempting to obtain certification for the same job. The officer of the Department of Labor who rejected the first two applications was subsequently promoted and served as the reviewing officer of another department official's rejection of the third application. Although the Court based its decision on an administrative regulation which required a separation of functions and not on the due process clause (although that issue was also involved — see 555 F.2d at 843), the Court first analogized to the due process clause's requirement of an unbiased adjudicator, and then continued:

> The obvious purpose of the regulation is to bar an officer from reviewing his own decision, and the certifying and reviewing functions in regard to Laos' third application were performed by different officials. Each of the three applications inaugurated an independent proceeding; each review was directed exclusively toward the certifying officer's initial decision on a particular application. When White served as reviewing officer on the third application, the issue concerned Ms. Richardson's denial of that application and not White's rulings on the two prior applications.
>
> * * *
>
> These precedents, we think serve well to guide the decision now to be made. They teach that the

3. 8 U.S.C. §1182(a) (14) provides that aliens can enter the United States to perform labor only if the Secretary of Labor certifies that American workers are not available for the job and that wages and working conditions of similarly employed American workers will not be adversely affected.

> statute works a disqualification of an appellate judge only when an appeal involves a question decided by the judge at the trial level. We think the Secretary's regulation, which seeks for administrators what the statute exacts for federal judges, should be given the same construction. While the three applications on Lao's behalf sought the same type of certification and the supporting arguments echoed a familiar theme, the central question on each application was the sufficiency of Honeywell's showing of the unavailability of American workers for the post that Lao wished to permanently fill. *That demonstration varied factually, though unsuccessfully, as on each application Honeywell strove to improve it. White, as reviewing officer on the third application, thus faced no action which he took on either of the two prior applications.* We hold that the regulation was not violated.

Id. at 843-45 (emphasis added).

Here, too, each of the proceedings involving petitioner varied factually and legally. Petitioner has not carried his burden of proving that the procedures utilized by the Board create a risk of actual bias and prejudgment sufficient to overcome the presumption of honesty and integrity on the part of Board members. *See Withrow v. Larkin;* 421 U.S. at 47; *Martin-Trigona v. Underwood,* 529 F.2d 33 (7th Cir. 1975); *Schweiker v. McClure,* 456 U.S. at 195-96; *United States v. Perlstein,* 126 F.2d 789, 806 (3d Cir.), *cert. denied,* 316 U.S. 678 (1942) (Circuit judge designated to preside at criminal trial where defendants were convicted, but on appeal convictions were reversed. The judge did not take part in the retrial, but he did sit as a member of the court which heard the appeal from the convictions on retrial, and this procedure was held appropriate). *See also Noah v. United States,* 316 F.2d 159, 160 (9th Cir.), *cert. denied* 375 U.S. 855 (1963); *In re Oxman,* 496 Pa. at 544-45, 437 A.2d at 1174.

None of the cases upon which petitioner relies are applicable to this case. First and foremost, in each of those cases the alleged commingling occurred in the investigation and hearing of the same facts and charges. The Board's Rules admittedly prevent that here. And, in *Tumey v. Ohio*, 273 U.S. 510 (1927) cited P-8, this Court invalidated an enforcement procedure on due process grounds because the judge hearing the case had a direct pecuniary interest in the number of convictions he rendered. The case of *In re Murchison*, 349 U.S. 133 (1955), relied on at P-8-9, and involving a contempt proceeding, has recently been further clarified by this Court in rejecting a similar effort to rely on it:

> Appellee relies heavily on *In re Murchison, supra*, in which a state judge, empowered under a state law to sit as a "one-man grand jury" and to compel witnesses to testify before him in secret about possible crimes, charged two such witnesses with criminal contempt, one for perjury and the other for refusing to answer certain questions, and then himself tried and convicted them. This Court found the procedure to be a denial of due process of law not only because the judge in effect became part of the prosecution and assumed an adversarial position, but also because as a judge, passing on guilt or innocence, he very likely relied on "his own personal knowledge and impression of what had occurred in the grand jury room," an impression that "could not be tested by adequate cross-examination." 349 U.S. at 138.

Withrow v. Larkin, 421 U.S. at 53.

Plainly enough, *Murchison* has not been understood to stand for the broad rule that the member of an investigative agency may not investigate facts, institute proceedings, and then make the necessary adjudications.

The Supreme Court of the United States has con-

sidered an argument of alleged commingling of functions by quasi-judicial administrative bodies on at least eleven separate occasions. In not one instance has this Court found the challenged procedure to be a violation of due process. 3 K. Davis, *Administrative Law Treatise* §18:2 (2d ed. 1980). Indeed, this Court's Opinion in *Withrow v. Larkin* reveals a long and unbroken line of decisions holding that it is no denial of due process *even* for the same persons to serve as both investigators and adjudicators in the *very same proceeding*. Thus, it is clearly no denial of due process in this case, where the Board Rules provide the additional safeguard of preventing members from performing dual functions in the same case. See Board on Professional Responsibility Rule 5, page 53a (Petitioner has evidently copied an earlier version of this Rule, and the current version refers to the "Board on Professional Responsibility" instead of to the "Censor Committee", the previous name of the same agency).

Further, petitioner's attempt to distinguish *Withrow v. Larkin* was considered by the Court below and rejected. Petitioner there contended that *Withrow* allowed a commingling of "investigative" and "adjudicative" roles, but not "prosecutorial" and "adjudicative". However, as the Delaware Supreme Court noted, Board members are acting as investigators, not prosecutors. The mere presentation of the evidence collected does not make that individual a prosecutor. *See Matter of Duncan*, 541 S.W.2d 564, 568 (Mo. 1976).

Finally, it is significant that only the Supreme Court of Delaware can make a final decision on the imposition of discipline, and therefore any commingling of functions is even further removed from the final decision making process. *Matter of Duncan*, 541 S.W.2d at 568.

II. THE DISCOVERY PROVISIONS OF THE RULES ARE NOT UNCONSTITUTIONAL.

Beginning at P-15 petitioner contends, with respect to No. 75, that the discovery rules of the Board on Professional Responsibility violate his right to due process by denying him reciprocity of discovery and shifting the burden of proof and therefore, he argues, they are invalid and he did not need to comply with them. However, petitioner was provided with adequate rights to obtain evidence and with adequate protection. As the Delaware Supreme Court noted (p. 27a), Rule 11 of the Board provides that:

> Any person complained against shall have the right to defend against the charge by the introduction of evidence and the right to be represented by counsel and to examine and cross-examine witnesses. He shall also have the right to the issuance of subpoenas for the attendance of witnesses to appear and testify or for the production of books and records.

Also, Rule 10 gives the respondent a right to seek an appropriate order to compel "the testimony of a witness residing out of the State by deposition or otherwise."

Finally, under Rule 5 petitioner has a right to apply "to the full Board . . ., for a protective order, and the Board . . ., for good cause shown, may quash or modify the subpoena or grant protective relief from the interrogatories." See 53a (unfortunately, as we have noted, the appendix to the Petition copies an earlier version of the Rules, when the Board on Professional Responsibility was named "Censor Committee.")

In any event, since this is not a criminal proceeding petitioner is not entitled to full reciprocity of discovery, and the discovery rules of the Board on Professional Re-

sponsibility are therefore valid. *See In re Oxman*, 496 Pa. at 540-541; 437 A.2d at 1172.[4]

Finally, even if, contrary to our contentions, there were some merit to petitioner's argument here, petitioner was still properly disciplined here since he chose merely to defy the discovery requests rather than to seek a protective order. *See United States v. United Mine Workers of America*, 330 U.S. 258, 293-94 (1944).

III. THE PETITIONER WAS CLEARLY NOTIFIED OF THE CONTEMPT PROCEEDING, AND IT WAS ON A FINDING OF CONTEMPT THAT THE BOARD URGED HE BE DISCIPLINED.

This particular part of the petition relates to No. 75 only. Petitioner claims there was a violation of due process because he was never notified prior to the hearing on 75 that he was charged with a discipline violation because of his defiance of the discovery procedures, and instead understood he was facing only a contempt procedure. He further finds discipline inappropriate because he said he relied on the advice of counsel.

However, petitioner misconceives what happened in this situation. Petitioner received ample notice of the behavior which was to be the subject of the hearing before the Board. And, prior to the final hearing in the Supreme Court he was notified that that conduct had led to a recommendation of discipline (See 17a) by the Board's Final Report which recommended discipline based on the contemptuous behavior of petitioner in failing to answer subpoenas and interrogatories. No other finding stands in the Final Report and all evidence substantiates that the respondent was on notice that he might be

4. Petitioner relies on *Wardius v. Oregon*, 412 U.S. 470 (1973), but that was a criminal, not an attorney discipline proceeding, and related to Oregon's special rules applicable to alibi defenses. We know of no authority requiring reciprocity of discovery in discipline proceedings.

disciplined because he willfully failed to answer the subpoenas and interrogatories. As was stated in *Javits v. Stevens*, 382 F. Supp, 131, 139 (S.D.N.Y. 1974), listing the Canons adds nothing to a petition where the facts are alleged adequately. As the Delaware Supreme Court noted, this was not a recommendation for discipline based on a finding of a disciplinary violation under the Code of Professional Responsibility.

The Delaware Supreme Court noted that disciplinary processes, although they may overlap contempt sanctions to some degree, are designed to focus on protection of the public from lawyers whose conduct falls below that prescribed by the Code of Professional Responsibility. The contempt in failing to respond to proper discovery called into question petitioner's fitness to practice law, and must be weighed in determining the discipline to be imposed. Thus, the contempt finding was properly considered by the Court below in determining petitioner's fitness to practice law. 33a.

IV. THE BOARD'S EXERCISE OF ITS DISCRETION IN DENYING PETITIONER'S REQUEST FOR A CONTINUANCE DID NOT DENY PETITIONER HIS RIGHT TO COUNSEL, HIS RIGHT TO CONFRONT WITNESSES OR HIS RIGHT TO A FAIR TRIAL.

Petitioner's complaints relating to the continuance request concern only the Tingle case, No. 60. The facts, as related at P-4-5 and P-19-21, and also in the Delaware Supreme Court Opinion, disclose that petitioner had some six months notice that possible charges against him were pending, and he made no request for a continuance until after one month following receipt of notice that the hearing date had been set. He had two weeks' notice that his application for a continuance had been denied but there is no evidence in the record that he made any effort whatsoever to obtain substitute counsel. See 29a. Further, and perhaps most important, the

application for a continuance was presented because petitioner's counsel desired to attend to another matter which, in fact, was scheduled after he learned of the scheduling of the discipline hearing. The Board felt that any request for a continuance should be made to those organizations which subsequently created the conflict and not to the Board.

It appears to be undisputed that the grant or denial of a continuance of this kind is a matter of discretion. *Raymond Heartless, Inc. v. State*, 401 A.2d 921 (Del. 1979); *Blackledge v. Commonwealth*, 62 Pa. Commw. 188, 435 A.2d 309 (1981). *See also Martin v. State*, 433 A.2d 1025, 1034 (Del. 1981). Accordingly, a decision denying a request for a continuance will not be disturbed unless that decision is unreasonable, arbitrary or capricious. *Ungar v. Sarafite*, 376 U.S. 575 (1964); *Morris v. Slappy*, ____ U.S. ____, 103 S. Ct. 1610 (1983). This rule is equally applicable to professional disciplinary proceedings. *Bar Ass'n of Baltimore City v. Cockrell*, 270 Md. 686, 313 A.2d 816 (1974); *Blackledge v. Commonwealth*, 62 Pa. Commw. at 191; 435 A.2d at 311.

Further, the right to counsel is not to be interpreted as a right to any specific counsel. In *Hodge v. Hodge*, 507 F.2d 87 (3d Cir. 1975) the Court of Appeals stated that:

> The refusal to grant a continuance is not, without more, a denial of the right to counsel even though the refusal prevents a party from being represented by a particular attorney because of that attorney's other professional commitments.
>
> * * *
>
> The rule in this circuit . . . is that "although the right to counsel is absolute, there is no absolute right to a particular counsel."

507 F.2d at 90 (citations omitted).

Unfortunately, although the *Hodge* Opinion, and the above quotation, were relied on by the Delaware Su-

preme Court in its Opinion here attacked by petitioner, petitioner does not even mention the case or the quotation in the petition.

Petitioner could have obtained substitute counsel in the two weeks available to him. Petitioner complains that "there was no inquiry by the Board as to the time needed either for new counsel or for petitioner's counsel to be present." P-24. However, that is because petitioner simply chose to defy the Board and leave the hearing voluntarily. See page 29a. The claims in No. 60 relating to the outrageous behavior of petitioner in a magistrate's court were simple and straightforward both factually and legally (see above Statement of Facts), so there would have been ample time for a substitute attorney to prepare the case.[5] As the Delaware Supreme Court noted (p. 29a) the facts were not novel, and no special expertise was required. Petitioner's failure to try to get other counsel does not constitute any denial of a right to counsel. *See Ungar v. Sarafite,* 376 U.S. at 590 (five days to obtain other counsel to defend criminal contempt charge is not a denial of due process.)

As to petitioner's contention that there was a lack of confrontation, it should be noted again that petitioner voluntarily left the hearing, thereby defying a subpoena commanding him to appear and testify. Thus he was solely responsible for the determination not to have substitute counsel appear, and not to confront the witnesses himself. Under these circumstances he cannot properly complain about the situation of his own creation.

---

5. The charges against petitioner arose out of his conduct at a trial which lasted approximately three hours and involved four principal actors. Moreover, petitioner had knowledge of the expected testimony of those witnesses, as early as October 8, 1981, when he received a letter from Mr. Biondi in which Mr. Biondi set out a detailed summary of the statements taken from each witness. Board's Exhibit 4; Transcript page 52. *See also* Board's Exhibit 11; Transcript pages 58-59 (transmitting all exhibits to petitioner well in advance of trial).

V. THE PETITIONER HAD ADEQUATE OPPORTUNITY TO PRESENT EVIDENCE AS TO THE NATURE OF THE DISCIPLINE TO BE IMPOSED, AND PETITIONER NEITHER SOUGHT NOR WAS ENTITLED TO AN ADDITIONAL SEPARATE HEARING FOR THIS PURPOSE.

For the first time in his petition for reargument before the Delaware Supreme Court petitioner raised a complaint about not having an "opportunity to present evidence as to the nature of the discipline to be imposed". Such a hearing had not been sought before, and was not sought in his request for reargument — petitioner merely complained of the absence of such a hearing.

In fact, petitioner was not precluded at the hearing before the Board from presenting evidence as to the severity of the discipline to be imposed. Had he wished to come forward at that time with evidence of mitigating circumstances, he was free to do so. Moreover, he has cited no authority whatsoever for the proposition that due process of law mandates an entirely separate hearing directed solely toward the appropriate sanction to be imposed once a finding of unethical conduct has been made.

We submit that by not seeking a separate hearing on the nature of the sanctions to be imposed either before the Board or before the Delaware Supreme Court petitioner has waived any right he may have had to such a hearing.

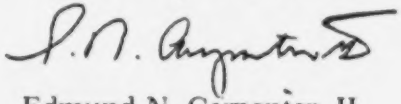
Further, we submit there does not exist any right to such a separate hearing. *In re Smith*, 75 Ill.2d 20, 25 Ill. Dec. 660, 387 N.E.2d 316, *cert. denied*, 444 U.S.841 (1979). In a discipline case, such as this, the hearing before the Board, and the hearing before the Delaware Supreme Court afford ample opportunity, in connection with a discussion of whether or not there should be any discipline to discuss all mitigating circumstances which

would have any bearing on the nature of the discipline to be imposed.

CONCLUSION

For the foregoing reasons we urge that the petition for a writ of certiorari be denied.

Respectfully submitted.



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Dated: April 27, 1984

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No. 83-1606

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

JOHN B. KENNEDY,

Petitioner

v.

THE BOARD ON PROFESSIONAL RESPONSIBILITY OF THE SUPREME COURT OF DELAWARE and THE SUPREME COURT OF DELAWARE,

Respondents

On Petition for a Writ of Certiorari to the Supreme Court of the State of Delaware

SUPPLEMENTAL BRIEF FOR RESPONDENTS

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TABLE OF CONTENTS

	Page
Table of Authorities	i
Supplemental Brief	1
Conclusion	4

APPENDIX

Appendix A: Opinion and Order of Chief Judge Stapleton dated April 27, 1984	A-1
Appendix B: Memorandum from Judge McNeilly dated April 24, 1984	B-1

TABLE OF AUTHORITIES

Cases

Matter of Felmeister, 95 N.J. 431, 471 A.2d 775 (1984)	2

No. 83-1606

IN THE

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On Petition for a Writ of Certiorari to the Supreme Court of the State of Delaware

SUPPLEMENTAL BRIEF FOR RESPONDENTS

Since the date on which we delivered our Brief for Respondents to the printer (that Brief was mailed to the Clerk of the Court and to the petitioner by certified mail on April 27, 1984) there have been three developments which we feel should be brought to the attention of the Court:

1. On April 27, 1984, the United States District Court for the District of Delaware, following a hearing on an order to show cause why the imposition of identical discipline on the petitioner in this case (John B. Kennedy) should not be imposed, issued an Opinion considering each of the arguments made by John B. Kennedy and agreeing with the Opinion of the Delaware Supreme Court. A copy of that Opinion and the Order issued pursuant to it is attached as Appendix A.

2. On April 24, 1984, the Supreme Court of Delaware mailed out corrected pages 1, 7, 14, 19 and 30 in the John B. Kennedy Opinion. A copy of the letter of transmittal, and the corrected pages are attached hereto as Appendix B. It appears all changes are purely typographical in nature.

3. There has now come to our attention the recently reported decision *Matter of Felmeister*, 95 N.J. 431, 471 A.2d 775 (1984). In that case the Court was considering whether or not discipline was appropriate for the intentional violation of a Court Rule. The respondents there had argued that the Rule (which related to advertising) was unconstitutional and therefore they should not be disciplined. The argument was thus similar to the argument made by petitioner Kennedy in this case who argues that the discovery rules issued by the Delaware Supreme Court are unconstitutional because they do not provide full reciprocity, and therefore he should not be disciplined for having wilfully disregarded them. In commenting on that situation the New Jersey Supreme Court stated:

> Respondents, however, chose not to seek a declaratory judgment but to violate the mandate of the Court. Despite being fully aware of the Rule and its meaning, the respondents intentionally violated it. *Cf. In re Hinds*, 90 N.J. 604, 630-31, 449 A.2d 483 (1982) (where the conduct proscribed by the Rule, which involved political as distinguished from commercial speech, was ambiguous and the disciplinary restriction was not expressly brought to the attention of the attorney before his conduct occurred). We do not view their actions as being substantially different from those of individuals who violate a court order and then seek to raise the unconstitutionality of the injunction as a defense to prosecution for the violation. Unconstitutionality is not a defense. For example, in *Walker v. Birmingham*, 388 U.S. 307, 320, 87

> S.Ct. 1824, 1831, 18 L.Ed.2d 1210, 1219 (1967), the Supreme Court upheld the conviction of civil rights demonstrators for violating an *ex parte* injunction issued to enforce an ordinance prohibiting parading or demonstrating without a license. The Supreme Court held that the ordinance's unconstitutionality was unavailable as a defense. The Court stressed that the defendants knowingly had failed to pursue available judicial remedies and upheld their criminal convictions, stating that, 'in the fair administration of justice no man can be judge in his own case, however exalted his station, however righteous his motives***. [R]espect for judicial process is a small price to pay for the civilizing hand of law***.' *Id.* at 320-21, 87 S.Ct. at 1831-32, 18 L.Ed.2d at 1219-20 (footnote omitted) *See generally* Blasi, 'Prior Restraints on Demonstrations,' 68 *Mich.L.Rev.* 1481, 1536-52 (1970) (discussing judicial review of restraints on political speech).

95 N.J. at ____, 471 A.2d at 782-783.

CONCLUSION

For the reasons advanced in the Brief of Respondents, and in the materials submitted in this Supplemental Brief for Respondents, we urge the Court to deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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Dated: May 15, 1984

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

In the Matter of:	:	
	:	
JOHN B. KENNEDY,	:	Misc. No. 84-21
	:	
Respondent	:	

Samuel C. Stretton, Esquire, West Chester, Pennsylvania, Attorney for Respondent.

O. Francis Biondi, Esquire, Morris, Nichols, Arsht & Tunnell, Wilmington, Delaware, and

Walter S. Rowland, Esquire, Hercules, Inc., Wilmington, Delaware, and

F. Alton Tybout, Esquire, Tybout, Redfearn, Casarino & Pell, Wilmington, Delaware, for the Board of Professional Responsibility

---

OPINION

Wilmington, Delaware
April 27, 1984

STAPLETON, *Chief Judge:*

This Court has received a certified copy of an Order of the Supreme Court of the State of Delaware, dated January 24, 1984, which temporarily suspends John B. Kennedy, Esquire from the practice of the law in the State of Delaware for a period of two years commencing January 24, 1984. A final mandate was entered by the Supreme Court of the State of Delaware on February 9, 1984. On February 16, 1984 this Court issued, pursuant to Local Rule 8.2B, an order to show cause why the im-

position of identical discipline by this Court would be unwarranted.

Local Rule 8.2B provides in pertinent part as follows:

8.2 DISCIPLINE IMPOSED BY OTHER COURTS

* * *

(2) Upon the filing of a certified or exemplified copy of a judgment or order demonstrating that any attorney admitted to practice before this Court has been disciplined by another court, this Court shall forthwith issue a notice directed to the attorney containing:

(a) a copy of the judgment or order from the other court; and

(b) an order to show cause directing that the attorney inform this Court within 30 days after service of that order upon the attorney, personally or by mail, of any claim by the attorney predicated upon the grounds set forth in (4) hereof that the imposition of the identical discipline by the Court would be unwarranted and the reasons therefor.

(3) In the event the discipline imposed in the other jurisdiction has been stayed there, any reciprocal discipline imposed in this Court shall be deferred until such stay expires.

(4) Upon expiration of 30 days from service of the notice issued pursuant to the provisions of (2) above, this Court shall impose the identical discipline unless the respondent-attorney demonstrates, or this Court finds, that upon the face of the record upon which the discipline in another jurisdiction is predicated it clearly appears:

(a) that the procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or

(b) that there was such an infirmity of proof establishing the misconduct as to give rise to the clear conviction that this Court could not, consistent with its duty, accept as final the conclusion on that subject; or

(c) that the imposition of the same discipline by this Court would result in grave injustice; or

(d) that the misconduct established is deemed by this Court to warrant substantially different discipline.

Where this Court determines that any of said elements exist, it shall enter such other order as it deems appropriate.

(5) In all other respects, a final adjudication in another court that an attorney has been guilty of misconduct shall establish conclusively the misconduct for purposes of a disciplinary proceeding in this Court.

(6) This Court may at any stage appoint counsel to prosecute the disciplinary proceedings.

On March 4, 1984, Mr. Kennedy, through counsel, filed Respondent's Motion in Opposition to the Imposition of Identical Discipline and Request for a Hearing. Shortly thereafter, this Court appointed three attorneys to prosecute these disciplinary proceedings pursuant to Local 8.2B(6). After the record in the State Court proceedings had been obtained and filed with this Court, an oral argument on respondent's motion was held on April 11, 1984.

Respondent makes ten arguments in support of his position that it is inappropriate to impose an identical sanction. Each of these arguments was advanced before the Supreme Court of Delaware and was given careful and thorough consideration by that tribunal as reflected in the attached copy of the opinion for that Court authored by Justice McNeilly. I agree with the conclusions

reached in that opinion and offer the following solely by way of supplemental comment.

The facts found in the State disciplinary proceedings are set forth on pages 2-16 of the Supreme Court's opinion. Since I find no fault with the State proceedings, I accept these findings of fact.

I.

Respondent's initial argument is that he was denied the right to due process by the commingling of the investigative, prosecutorial, and adjudicative functions of the Censor Committee.[1] I agree with and adopt the Delaware Supreme Court's analysis of these contentions and its conclusions. (*See* Slip Op. pp. 16-21). The emphasis placed in this Court on two arguments in this area causes me to make only two additional comments. It does not offend due process for a member of a Censor Committee, after it has reached a decision on a recommendation to the Supreme Court, to urge adoption of that decision before that Court. It is difficult to see how there could be any effect adverse to a respondent from such a procedure. Nor does it offend due process for the Committee to hear the results of an investigation without the respondent being present for the purpose of deciding whether there should be a formal proceeding. *Withrow v. Larkin*, 421 U.S. 35 (1975).

II.

Respondent's second contention is that the introduction of hearsay evidence before the Committee violated his right to due process. I agree with and adopt the Delaware Supreme Court's analysis of this contention and its conclusion with respect thereto. (*See* Slip Op. pp. 21-23). While reliance upon some forms of hearsay evi-

1. Since it (sic) proceedings in these matters, the Censor Committee has been renamed the Board of Professional Responsibility and is sometimes referred to by that title in the record before the Delaware Supreme Court.

dence in an attorney disciplinary proceeding might violate due process in some circumstances, respondent points to no evidence allegedly admitted in error which played a material role in the findings against him.

III.

Respondent next challenges on grounds of vagueness Disciplinary Rule 2-106 which relates to the charging of excessive fees. I agree with and adopt the analysis of the Delaware Supreme Court and its conclusions with respect to this contention. (*See* Slip Op. pp. 23-26)

IV.

A denial of an application for a continuance provides the basis for respondent's fourth attack. The denial of this application allegedly deprived respondent of his rights to counsel, to confront witnesses, and to a fair trial in Case No. 60, 1983. I agree with and adopt the analysis of the Supreme Court of Delaware and its conclusion with respect to this contention. (*See* Slip Op. pp. 27-29).

V.

In Matter 75, 1983, respondent contends that he was denied due process by the failure to give him notice that the charges set forth in a rule to show cause why respondent should not be held in contempt were also claimed to be disciplinary violations. Respondent asserts that being notified that one is charged with civil contempt is not the equivalent of being notified that one is charged with disciplinary violations since the former charge, if sustained, can be cured by compliance — in this instance, by supplying the information and documents called for in the Censor Committee's interrogatories and subpoenas. For present purposes, I accept the validity of this assertion. This does not aid re-

spondent, however. The Censor Committee in Matter 75, 1983 recommended coersive discipline for a contempt of court. Specifically, it recommended:

> . . . [T]hat the appropriate order finding respondent in contempt be modeled after that in *Delaware State Bar Association v. Alexander*, Del. Supr., 386 A.2d 652, 664 (1978) [five months imprisonment suspended on condition that the defendant comply with a contemporaneously entered injunction]. The purpose of such a remedial order of contempt imposing a sanction of imprisonment on respondent is to insure his compliance with the process of the Board in a *timely* fashion. Bd. Prof. Resp. Answering Br. in Support of its Report, p. 8.

The Delaware Supreme Court expressly pointed out that the Committee's Final Report "recommends discipline for a finding of contempt . . . in failing to answer subpoenas and interrogatories [and was not] a recommendation for discipline based upon a finding of a disciplinary violation . . . ." (Slip Op. pp. 29-30). The Supreme Court did not accept the recommendation of the Censor Committee, however.

When discussing the appropriate action to be taken, the Court expressly distinguished between contempt proceedings and disciplinary proceedings "designed to focus on the protection of the public from lawyers whose conduct falls below that prescribed by the Code of Professional Responsibility." (Slip Op. p. 33). The Court nonetheless concluded that all of respondent's conduct as a member of the Bar, including contemptuous acts, should be taken into account in determining the appropriate discipline to impose. Thus, the Court stated:

> [I]t is difficult to conclude that those instances which involve contemptuous acts do not call into question the fitness of Kennedy to practice law. Therefore, we weigh them equally along with the

other types regardless of the contempt sanctions (or lack thereof) already imposed.

Thus, this case does not pose the issue of whether a suspension could have been imposed in Matter 75, 1983 if it had stood alone. Rather it poses the issue of whether a court in a disciplinary proceeding may consider contemptuous conduct by the respondent not constituting a disciplinary violation in determining the appropriate disciplinary sanction for other conduct which does violate the Code. I conclude that the due process clause does not foreclose a court from this approach.

VI.

Next, respondent insists that Discovery Rule DR 1-103 and related Censor Committee rules violate due process because they do not allow for reciprocity of discovery and, in effect, shift the burden of proof to the respondent.

Censor Committee Rule 8 provides that "the Committee may require any member of the Bar to answer written interrogatories propounded by it relevant to any matter which is the subject of an investigation or a preliminary or formal hearing." Rule 5 allows the Board to issue subpoenas as a part of its investigation. While respondent, like the Committee, has the right to issue subpoenas to compel the testimony of witnesses at the hearing and the production of documents, the only pre-hearing discovery rule applicable to the respondent provides that he or she can compel "the testimony of a witness residing outside the state by deposition or otherwise."

The Committee's right to pre-hearing discovery is limited by Rule 5 which provides that the respondent may seek a protective order with respect to interrogatories or subpoenas issued in the course of the investigation.

In support of the proposition that these rules violate due process, respondent relies upon *Wardius v. Oregon*, 412 U.S. 470 (1973) in which the Supreme Court struck down an Oregon statute which required the defendant in a criminal case to notify the prosecution of, and provide information with respect to, an alibi defense but which provided for no reciprocal discovery from the prosecution. The Court there observed:

> Although the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded, but cf. *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, it does speak to the balance of forces between the accused and his accuser. . . . But we do hold that in the absence of a strong showing of state interests to the contrary, discovery must be a two-way street. The State may not insist that trials be run as a 'search for truth' so far as defense witnesses are concerned, while maintaining 'poker game' secrecy for its own witnesses. It is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the State." *Id.* P. 2212

I think it self-evident that the Censor Committee could not do its job effectively without the authority to pursue its investigations and case development through compulsory process. It is not self-evident that the state has a compelling interest in providing such compulsory process to investigators while denying it to the respondent at the pre-hearing stage. Nonetheless, I do not consider the *Wardius* case to be apposite.

First, this is not a criminal case and while respondent has a great deal at stake, that is not unusual in many forms of administrative proceedings. It does not, in my judgment, violate due process for an agency to have compulsory process for the purpose of an administrative

investigation even though other interested parties are not entitled to pre-hearing discovery.

Second, denial of pre-hearing discovery rights to respondents in this context does not involve the same kind of unfairness inherent in Oregon's statute. The nature of an attorney disciplinary proceeding is such that it necessarily arises out of some professional relationship which the respondent has had in the past. Accordingly, it is ordinarily not difficult for a respondent to prepare any defense he or she may have for a disciplinary hearing and it is very rare that the investigator's case will involve significant surprise.

The Censor Committee discovery rules do not provide a reason for failing to impose identical sanctions.

VII.

Respondent's seventh argument is that he was denied due process and equal protection in Matter 75, 1983 by the appointment of a special prosecutor. I agree with and adopt the analysis of the Delaware Supreme Court and its conclusion with regard to this contention. (*See* Slip Op. p. 21, including footnote 7).

VIII.

Respondent next complains that once he was found in violation of the charged disciplinary rules he should have had the opportunity to present evidence as to the nature of the discipline to be imposed. Respondent had the opportunity to present such evidence at the hearing before the Censor Committee, however, and I know of no authority which requires a two hearing approach in this context.

IX.

In Matter 75, 1983 the respondent contends that discipline was not warranted since at all pertinent times

the respondent, on advice of counsel, was making a good faith challenge to the rules. I agree with and adopt the analysis and conclusion of the Delaware Supreme Court with respect to this issue. (*See* Slip Op. p. 30).

X.

Finally, respondent contends that the evidence was insufficient to support the findings in Nos. 60, 204 and 205 of 1983. I conclude that there was ample evidence to support those findings.

XI.

This Court will impose sanctions identical to those imposed by the Supreme Court of the State of Delaware.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

In the Matter of:	:	
	:	
JOHN B. KENNEDY,	:	Misc. No. 84-21
	:	
Respondent	:	

ORDER

THIS 27th day of April, 1984, for the reasons set forth in this Court's Opinion of this date,

IT IS ORDERED that John B. Kennedy, Esquire is hereby suspended from the practice of law before this Court for a two year period commencing April 27, 1984.

/s/ WALTER K. STAPLETON
United States District Judge

B-1

SUPREME COURT OF DELAWARE

MEMORANDUM

FROM: JUSTICE McNEILLY

April 24, 1984

All Justices
O. Francis Biondi, Esq.
Walter S. Rowland, Esq.
Samuel C. Stretton, Esq.
Loren Myers, Clerk
Steve Taylor, Deputy Chief Clerk

Please substitute the enclosed corrected pages 1, 7, 14, 19 and 30 in the John B. Kennedy Opinion sent to you on January 24, 1984. Thanks.

encls.

JM

IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE:

JOHN B. KENNEDY, Esquire,	§	Nos. 204 &
a member of the Bar of	§	205, 1982
the Supreme Court of the	§	Nos. 60 &
State of Delaware.	§	75, 1983

Submitted (Nos. 204 & 205, 1982) : April 11, 1983*
Submitted (Nos. 60 & 75, 1983) : October 17, 1983
Decided : January 24, 1984

Before MCNEILLY, HORSEY AND MOORE, Justices.

Proceeding upon Final Reports of the Board on Professional Responsibility.

O. Francis Biondi (argued), Wilmington, for the Board on Professional Responsibility as to Nos. 204, 1982 and 60, 1983.

F. Alton Tybout (argued), Wilmington, for the Board on Professional Responsibility as to No. 205, 1982.

Walter S. Rowland (argued), Wilmington, for the Board on Professional Responsibility as to No. 75, 1983.

Samuel C. Stretton (argued), West Chester, Pennsylvania, for the respondent.

MCNEILLY, *Justice:*

* Issuance of a decision in Nos. 204 and 205, 1982, submitted on April 11, 1983 was deferred until this time in order for the Court to address the common issues of law raised in Nos. 60 and 75, 1983, submitted on October 17, 1983.

which was exactly one-half of Mr. Book's entitlement. Mr. Kennedy explained that a portion of the check was taken to pay for the orthopedic examination and report. On September 2, 1980, Mr. Book went to Mr. Kennedy's office to pick up an additional disability check. The check again was in the amount of $83.08, one-half of Mr. Book's entitlement. Mr. Kennedy then informed Mr. Book that there was no mistake because he would be taking fifty percent (50%) of the temporary total disability check as legal fees. Testimony revealed that Mr. Kennedy had altered the prior "contingent fee agreement" because Mr. Book could not advance costs. Mr. Kennedy increased the contingent fee from forty percent (40%) to fifty percent (50%) and stated he would cover the costs of the litigation in exchange for the increase in the contingent fee.

4. Mr. Elder of Aetna testified that Mr. Kennedy's imput in two telephone calls to the company had no affect "sic" on the company's decision to pay temporary total. Aetna never challenged nor disputed Mr. Book's right to temporary total payments. Based on the statements of Mr. Book's employer, Gilpin, and the insurance carrier, we find there was never a dispute over compensation for temporary total disability under the Workman's Compensation statute. We further find that in addition to the contingent fee arrangement entered into between Mr. Book and Mr. Kennedy, Mr. Kennedy charged $10 per consultation on each of two separate occasions. We further find that an additional $100 was delivered by Mr. Book to Mr. Kennedy upon his second visit to Mr. Kennedy for consultation obstensibly for physician's fees.

5. Testimony of Morton Kimmel, an experienced Workman's Compensation plaintiff 's attorney, established a standard in the community whereby practice in New Castle County of attorneys experienced in temporary total disability claims is to charge no fee where there is no dispute and no litigation on a temporary total issue. Further, the practice generally is to conform to the Board's

On March 1, 1983, the Board issued the following Final Report recommending that Kennedy be disciplined for his failure to respond to subpoenas issued and interrogatories directed to him by the Board in eleven (11) proceedings pending before the Board charging Kennedy with professional misconduct.

(No. 75, 1983)

1. The following constitutes the Board's findings of fact:

The Respondent was served subpoenas and interrogatories pursuant to Rules 8 and 13 of the Rules of the Board of Professional Responsibility[4]

3.(continued)
a tribunal, a lawyer shall not:

* * *

(6) Engage in undignified or discourteous conduct which is degrading to a tribunal.

DR1-102(A)(5)
A lawyer shall not:

* * *

(5) Engage in conduct that is prejudicial to the administration of justice.

4. Rule 8 of the Board on Professional Responsibility states that "[t]he Board may require any member of the Bar to answer written interrogatories propounded by it relevant to any matter which is the subject of an investigation or a preliminary or formal hearing."

Rule 13 provides for the issuance of "[s]ubpoenas for the attendance of witnesses and the production of books and records . . . "and" may, in the alternative, require the person to whom it is directed to make written answer to written interrogatories to be attached thereto."

upon matters under preliminary investigation as follows:

Case No. 795 Sadie M. Smith
Served July 12, 1982
Case No. 806 Josephine Smith
Served July 12, 1982
Case No. 807 Louis F. Christo
Served July 8, 1982
Case No. 808 Ida Warren
Served September 23, 1982
Case No. 810 Rose Blanchfield
Served September 23, 1982
Case No. 811 Olga Wright
Served September 23, 1982
Case No. 816 Andre Brown
Served September 23, 1982
Case No. 817 Charlotte Dennis
Served September 23, 1982
Case No. 828 Jack Cullen
Served September 23, 1982
Case No. 829 Judge Poppiti
Served September 23, 1982
Case No. 836 Richard Billings
Served September 23, 1982

there is a commingling of functions." We find these arguments to be without merit.

In *Withrow v. Larkin*, 421 U.S. 35 (1975), the United States Supreme Court rejected a physician's claim that proceedings before the medical examining board to revoke his license denied him due process of law because the same members both investigated and adjudicated the case. In *Withrow v. Larkin*, the Court stated:

> The contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication has a much more difficult burden of persuasion to carry. It must overcome a presumption of honesty and integrity in those serving as adjudicators; and it must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.
>
> Very similar claims have been squarely rejected in prior decisions of this Court. *Id.* at 47.

In Nos. 204, 205 and 60, Kennedy has presented no evidence to overcome this presumption of honesty and integrity other than to say conclusively that the participation of a Board member who acts in an adjudicative or investigative role in one proceeding and in a judicial role in another proceeding involving different facts is a violation of due process. In effect, Kennedy asks this Court to hold that it is a *per se* violation of due process for the Board to combine its investigative and adjudicative functions where the combination does not occur

a recommendation for discipline based upon a finding of a disciplinary violation under the Code of Professional Responsibility. Therefore, Kennedy's first argument must fall.

Second, Kennedy's contention that he acted in good faith reliance on the advice of his attorney in not responding to interrogatories and depositions is not supported by the record. Unlike the situation in *In re Kennedy*, Del. Supr., 429 A.2d 987 (1981), where this Court upheld Kennedy's good faith challenge to production of records involving the Clients' Security Trust Fund, Kennedy completely ignored Rule 5 which was pertinent to this case and never sought a protective order from the full Board anytime during the five-month period between July 9, 1982, when he was served the earliest set of subpoenas and interrogatories in this matter, and December 8, 1982, when the hearing took place. Rather, he attempted to raise constitutional challenges to the discovery provision by petitioning this Court for a continuance on December 1, 1982 and upon denial of his request, raising them before the Board at the December 8, 1982 hearing. Based upon Kennedy's failure to adhere to the Rules as set forth by this Court, we find that he is barred from alleging a good faith argument in support of his position.

VIII

Having affirmed the findings of the Board, this court must now turn its attention to what disciplinary action, if any, must be taken to protect the public and uphold the integrity of the Bar. Generally, measures imposed for professional misconduct include private reprimand, public reprimand, suspension, and dis-